

APPEAL NO. 13-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Melissa J. Earll,

Plaintiff-Appellant

v.

eBay Inc.

Defendant-Appellee.

5:11-cv-262-EJD

On Appeal from the United States District Court
for the Northern District of California
The Honorable Edward J. Davila, Presiding

EXCERPTS OF RECORD, Volume I

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1 Plaintiff, by and through her attorneys, upon personal knowledge as to herself and her
2 own acts and upon information and belief as to all other matters, alleges as follows:

3 **NATURE OF THE ACTION**

4 1. Plaintiff Melissa J. Earll, a profoundly deaf person, brings this action on
5 behalf of herself and all others similarly situated against defendant eBay Inc. (“eBay” or
6 “Defendant”) for eBay’s unlawful practice of excluding person who are deaf or hard of
7 hearing from selling items on eBay.com.

8 2. eBay requires sellers to verify their identities in order to sell items on
9 eBay.com. To do so, eBay places an automated phone call to the would-be seller and requires
10 the would-be seller to verify her identity over the phone.

11 3. Plaintiff, as a deaf person, cannot communicate vocally by telephone. As a
12 result, she is not able to verify her identity with eBay.

13 4. eBay steadfastly refuses to offer Plaintiff an alternative means to verify her
14 identity, despite her repeated requests.

15 5. Thus, eBay has violated and continues to violate the American with
16 Disabilities Act (“ADA”), the California Disabled Persons Act (“DPA”), and the California
17 Unruh Civil Rights Act with respect to deaf and hard of hearing persons.

18 **PARTIES**

19 6. Plaintiff Melissa J. Earll is a resident of the city of Nevada in Vernon County,
20 Missouri.

21 7. Defendant eBay Inc. is the world’s self-described largest online marketplace
22 with 94 million registered users buying and selling \$62 billion worth of goods annually. eBay
23 Inc. is a Delaware corporation headquartered in San Jose, California. eBay Inc. does business
24 throughout the state of California, and the nation.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S. § 1331.

9. Personal jurisdiction and venue are proper because eBay is a corporation headquartered in Santa Clara County and/or because the improper conduct alleged herein occurred in, was directed from, and/or emanated or exported from California.

FACTUAL BACKGROUND

10. According to the Survey of Income and Program Participation (“SIPP”) conducted by the U.S. Census Bureau, there are approximately 1 million deaf persons and nearly 10 million hard of hearing persons in the United States.

FACTS RELATING TO EBAY

11. In 2010, eBay Inc. reported revenue of \$9.2 billion and income of \$1.8 billion.

12. Despite making billions of dollars annually, eBay has not implemented a system that allows deaf or hard of hearing persons to register as sellers with eBay.

13. In order to register as a seller with eBay, one must provide eBay with a phone number. eBay then calls that number to verify the identity of the registering individual. During the aural verification process, eBay’s automated system speaks a password or PIN to the prospective eBay seller. The prospective eBay seller then enters the PIN online to complete the registration process.

14. Because deaf and hard of hearing persons are not able to verify their identities or receive PINs via telephone, eBay’s verification system discriminates against deaf and hard of hearing persons in violation of the ADA, the DPA, and the Unruh Civil Rights Act.

15. eBay’s User Agreement, which it unilaterally drafted, states in relevant part:

Law and Forum for Legal Disputes - This Agreement shall be governed in all respects by the laws of the State of California as they apply to agreements entered into and to be performed entirely within California between California residents, without regard to conflict of law provisions. You agree that any claim or dispute you

1 may have against eBay must be resolved exclusively by a state or
2 federal court located in Santa Clara County, California, except as
3 otherwise agreed by the parties or as described in the Arbitration
4 Option paragraph below. You agree to submit to the personal
jurisdiction of the courts located within Santa Clara County,
California for the purpose of litigating all such claims or disputes.

5 16. Per eBay's User Agreement, Plaintiff's agreement with eBay and her
6 interactions with eBay are subject to California law.

7 17. Per eBay's User Agreement, Plaintiff is to be treated as a resident of
8 California for purposes of all legal disputes, including this lawsuit.

9 18. eBay successfully relied on this clause in moving to transfer this case from the
10 U.S. District Court for the Western District of Missouri to the present court, the U.S. District
11 Court for the Northern District of California.

12 19. eBay is judicially estopped from arguing that California laws do not apply to
13 this dispute or to Plaintiff. Having formally taken the position in this case that its "Law and
14 Forum for Legal Disputes" provision applies to this matter and to Plaintiff, eBay may not
15 now assert an inconsistent position.

16 **FACTS RELATING TO PLAINTIFF EARLL**

17 20. Plaintiff is diagnosed as profoundly deaf, the most severe categorization of
18 deafness. The categories of deafness in increasing order of severity are mild, moderate,
19 moderately severe, severe, and profound.

20 21. On June 23, 2008, Plaintiff unsuccessfully attempted to register to sell certain
21 items via eBay.com.

22 22. During the online registration process, after completing the description for the
23 item(s) she wished to sell on eBay, she was prompted to provide a phone number to eBay for
24 aural identity verification.

25 23. Because Plaintiff cannot hear, she is not able to verify her identity or receive a
26 PIN via telephone. eBay provided Plaintiff with no alternative means of identity verification.

1 24. Plaintiff clicked on the “Live Help” feature on the product listing page to
2 inquire about an alternative to receiving a telephone call for verifying her identity. Rather
3 than provide an alternative means, the eBay representative with whom Ms. Earll
4 communicated, Shannon C., instructed Plaintiff to have a hearing person answer the phone
5 for her in order to complete the registration process. Alternatively, the eBay representative
6 suggested that Plaintiff write to eBay’s Trust and Safety team to request the block on her
7 account be removed without voice verification.

8 25. Plaintiff grudgingly accepted the suggestion to write to the Trust and Safety
9 team in order to communicate to eBay that as a result of being deaf she needed to confirm her
10 identity via an alternative means.

11 26. On June 23, 2008, Plaintiff wrote to the eBay Trust & Safety team via email
12 to request that the block on her account be removed so that she could complete the
13 registration process and begin selling items on eBay.

14 27. On June 24, 2008, Plaintiff received a seemingly automated response to her
15 email from Randy S. at eBay Customer Support. The response did not in any way relate to
16 the voice verification process or her request to have the block on her account removed. The
17 response referred to a “page not responding error.”

18 28. On June 30, 2008, Plaintiff replied to the nonresponsive response and
19 reiterated the nature of her situation and request.

20 29. On July 3, 2008, Plaintiff received a response from Henry Y., an eBay
21 Customer Support Representative. Henry Y. apologized and provided to Plaintiff an internet
22 link at which Henry Y. told her she would be able to verify her identity through the “Live
23 Help” function at which time eBay would provide her with the PIN necessary to complete the
24 registration process.

25 30. On July 7, 2008, Plaintiff followed Henry Y.’s instructions and attempted to
26 verify her identity through the “eBay Account Security Live Help!”
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1 31. During her live chat session on July 7, an eBay representative identified as
2 Necia unsuccessfully attempted to register Plaintiff. Another eBay representative, Shayne,
3 then informed Plaintiff that eBay would only verify her identity by phone. “The system is
4 designed for us to send your PIN through a phone call. I apologize but we will not be able
5 [to] use a different method Melissa. . . . We can give you a PIN through a phone call. Some
6 account restrictions or issues can only be solved through a phone [sic] call and is one of those
7 case [sic] Melissa.” Shayne then reiterated the suggestion that Plaintiff enlist the help of a
8 hearing person to answer the phone for her, even after she reminded Shayne that she is an
9 independent adult who lives alone.

10 32. On July 7, 2008, Plaintiff emailed eBay Customer Support again to inform
11 them that eBay’s suggested method of verifying her identity via live chat with eBay Account
12 Security did not work.

13 33. On July 13, 2008, Plaintiff received a form email from the eBay Account
14 Security Team prompting Plaintiff to use the Live Help function to solve any problems. The
15 email was not directed toward her specific issue.

16 34. Plaintiff responded to this latest unhelpful email and reiterated her specific
17 concerns in no uncertain terms.

18 35. On August 4, 2008, Plaintiff received a response via email from Lily M. of
19 eBay Customer Support. Lily M. advised Ms. Earll that she forwarded Plaintiff’s email to the
20 “appropriate team.”

21 36. The August 4, 2008 email marked the end of Plaintiff’s attempts to register as
22 a seller with eBay until December 2009.

23 37. Plaintiff again unsuccessfully attempted to register to sell items on eBay.com
24 in or about December 2009. This attempt was unsuccessful for the same reason described
25 above: she was required to verify her identity by telephone.

26 38. Plaintiff was never able to register with eBay as a seller and thus prevented
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1 from using eBay's services solely because of her disability.

2 39. All of Plaintiff's interactions with eBay took place within the state of
3 California.

4 **EBAY'S VERIFICATION SYSTEM IS NEEDLESSLY DISCRIMINATORY**

5 40. eBay has taken affirmative steps to discriminate against deaf and hard of
6 hearing persons by creating a system that they cannot use. The basis of this suit is not that
7 eBay has passively failed to accommodate deaf and hard of hearing persons. Rather, the basis
8 of the suit is that eBay has gone out of its way to design a system that deaf and hard of
9 hearing persons cannot use.

10 41. By creating a seller registration system that solely utilizes sound, eBay has
11 erected a barrier to its website that screens out deaf and hard of hearing persons.

12 42. What makes eBay's discriminatory conduct all the more galling is that
13 solutions to this problem are easy and inexpensive to implement—solutions being used by
14 thousands of companies online. eBay simply needs to implement a seller registration system
15 that utilizes PINs presented visually and aurally.

16 **CLASS ALLEGATIONS**

17 43. Plaintiff Earll brings this action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2),
18 and 23(b)(3) on behalf of herself and a class of similarly situated persons: *all persons who*
19 *are deaf or hard of hearing in the United States who have attempted to register as sellers*
20 *with eBay and as a result have been prevented from doing so because of eBay's telephone*
21 *aural verification system*. Excluded from the Class are Defendant, their legal representatives,
22 assigns, and successors, and any entity in which Defendant has a controlling interest. Also
23 excluded is the judge to whom this case is assigned and the judge's immediate family.

24 44. The Class consists of thousands of individuals and other entities, making
25 joinder impractical.

26 45. The claims of Plaintiff are typical of the claims of all of the other members of
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1 the Class.

2 46. Plaintiff will fairly and adequately represent and protect the interests of the
3 other members of the Class. Plaintiff has retained counsel with substantial experience in
4 prosecuting complex litigation and class actions. Plaintiff and her counsel are committed to
5 vigorously prosecuting this action on behalf of the members of the Class, and have the
6 financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to
7 those of the other members of the Class.

8 47. Absent a class action, most members of the Class would find the cost of
9 litigating their claims to be prohibitive and will have no effective remedy. The class
10 treatment of common questions of law and fact is also superior to multiple individual actions
11 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
12 promotes consistency and efficiency of adjudication.

13 48. eBay has acted and failed to act on grounds generally applicable to Plaintiff
14 and the other members of the Class, requiring the Court's imposition of uniform relief to
15 ensure compatible standards of conduct toward the members of the Class.

16 49. The factual and legal bases of eBay's liability to Plaintiff and to the other
17 members of the Class are the same, resulting in injury to Plaintiff and all of the other
18 members of the Class. Plaintiff and the other members of the Class have all suffered harm as
19 a result of eBay's wrongful conduct.

20 50. There are many questions of law and fact common to the claims of Plaintiff
21 and the other members of the Class, and those questions predominate over any questions that
22 may affect individual members of the Class. Common questions for the Class include but are
23 not limited to the following: whether eBay's conduct described herein violates the ADA, 42
24 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and 12182(b)(2)(A)(i)-(iv); whether eBay's conduct
25 described herein violates the DPA, Cal. Civ. Code §§ 54 *et seq.*; and, whether eBay's
26 conduct described herein violates the California Unruh Civil Rights Act, Cal. Civ. Code
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§§ 51 *et seq.*

FIRST CAUSE OF ACTION

Declaratory Judgment that eBay's Conduct Violates the ADA

(on behalf of Plaintiff and the Class)

51. Plaintiff incorporates by reference the foregoing allegations.

52. Plaintiff and eBay have adverse legal interests. There is a substantial controversy between Plaintiff and eBay of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Plaintiff desires a judicial determination of their respective rights and duties, and a declaration that eBay, by not providing deaf and hard of hearing persons with a means to register to sell items via eBay, violated and continues to violate the ADA, 42 U.S.C. §§ 12181, *et seq.* as to Plaintiff and all deaf and hard of hearing persons.

53. Plaintiff seeks a declaratory judgment under Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 that eBay's conduct described herein violates the ADA, 42 U.S.C. §§ 12181, *et seq.*

SECOND CAUSE OF ACTION

Violation of the ADA, 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and (b)(2)(A)(i)-(iv)

(on behalf of Plaintiff and the Class)

54. Plaintiff incorporates by reference the foregoing allegations.

55. Section 12182(a) of the ADA states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

56. Sections 12181(7)(D) & (E) defines private entities, like eBay, as places of public accommodation to include a "place of public gathering" and "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment" when

they affect commerce. Section 12181(7) does not expressly limit places of public accommodation to brick- and-mortar operations, nor does it expressly preclude Internet-based operations.

57. Section 12181(1) defines commerce as “travel, trade, traffic, commerce, transportation, or communication—among the several States; between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country.”

58. eBay describes itself in the following manner:

With more than 94 million active users globally, eBay is the world's largest online marketplace, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. Their collective impact on e-commerce is staggering: In 2010, the total worth of goods sold on eBay was \$62 billion -- more than \$2,000 *every second*.

59. As a for-profit entity facilitating \$62 billion in sales of goods annually in and among the several States and internationally, eBay affects commerce, as defined in 42 U.S.C. § 12181(1).

60. As “the world’s largest online marketplace, where practically anyone can buy and sell practically anything” and by “connect[ing] a diverse and passionate community,” eBay is a “place of public gathering,” as well as a “shopping center” as defined in 42 U.S.C. §§ 12181(7)(D) & (E).

61. eBay lists its categories of items for sale at <http://shop.ebay.com/allcategories/all-categories>. These categories include “Clothing, Shoes & Accessories” and “Tools & Home Improvement,” among dozens of others, which correlate to the “clothing store” and “hardware store” definitions in 42 U.S.C. § 12181(7)(E). And with tens of millions of items for sale at any given moment, eBay is the epitome of a “shopping center, or other sales or rental establishment,” as defined in § 12181(7)(E).

62. Accordingly, eBay is a “place of public accommodation,” as defined in 42 U.S.C. §§ 12181(7) & 12182(a).

63. Sections 12182(b)(1)(A)(i)-(iii) state in relevant part that it shall be discriminatory to deny participation to, require participation of an unequal benefit, or provide a separate benefit to an individual or a class of individuals on the basis of a disability or disabilities.

64. Section 12182(b)(2)(A)(i) states that discrimination includes “the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability from fully and equally enjoying the goods, services, facilities, privileges, advantages, or accommodations unless necessary for the provision” thereof.

65. eBay violates this section by imposing upon would-be eBay sellers a registration process that screens out or tends to screen out deaf and hard of hearing persons.

66. Section 12182(b)(2)(A)(ii) states that discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . . ”

67. eBay violates this section by failing to make reasonable accommodations to its registration process necessary to afford deaf and hard of hearing persons access to eBay’s services, facilities, privileges, advantages, and accommodations.

68. Section 12182(b)(2)(A)(iii) states that discrimination includes “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . . ”

69. eBay violates this section by failing to take the necessary steps to ensure that deaf and hard of hearing persons are not excluded, denied services, segregated, or treated differently during the seller registration process.

70. Section 12182(b)(2)(A)(iv) states that discrimination includes “a failure to remove . . . communication barriers . . . where such removal is readily achievable.”

71. eBay violates this section by failing to remove communication barriers—namely the aural verification system—from the seller registration process.

THIRD CAUSE OF ACTION

Violation of the California Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.*

(on behalf of Plaintiff and the Class)

72. Plaintiff incorporates by reference the foregoing allegations.

73. The Disabled Persons Act (“DPA”) states that “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including . . . places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.” Cal. Civ. Code § 54.1(a)(1).

74. eBay.com constitutes a “public place” within the meaning of the DPA.

75. Deafness and hardness of hearing are disabilities as defined in Cal. Govt. Code § 12926.

76. By denying access to eBay’s selling services to deaf and hard of hearing persons, eBay, as a California business, is denying Plaintiff and Class members full and equal access to the accommodations, advantages, and facilities of eBay.com in violation of the DPA.

77. Additionally, Section 54(c) states that “[a] violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.”

78. As alleged above, eBay is violating the ADA; thus, it is—for this separate and independent reason from those articulated above—also violating the DPA.

79. Plaintiff and Class members are entitled to injunctive relief to remedy the

discrimination.

80. Section 54.3 explicitly states that “any person denied any of the rights provided in Sections 54, 54.1, and 54.2” (emphasis added) may bring suit.

81. Under § 54.3, Plaintiff and Class members are entitled to actual damages, treble damages, and statutory damages for each offense, plus attorneys’ fees.

FOURTH CAUSE OF ACTION

Violation of the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.*

(on behalf of Plaintiff and the Class)

82. Plaintiff incorporates by reference the foregoing allegations.

83. Cal. Civ. Code § 51(b) states:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

84. Cal. Civ. Code § 51.5(a) states:

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

85. Cal. Civ. Code § 51.5(b) defines “person” to include “any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.

86. Deafness and hardness of hearing are disabilities as defined in Cal. Govt. Code §§ 12926 and 12926.1.

89. Additionally, § 51(f) states that “[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

91. Section 52 explicitly states that “*any* person denied the rights provided in Section 51, 51.5, or 51.6” (emphasis added) may bring suit.

PRAYER FOR RELIEF

A. A preliminary and permanent injunction prohibiting eBay from violating the ADA;

B. A preliminary and permanent injunction prohibiting eBay from violating the DPA;

C. A preliminary and permanent injunction prohibiting eBay from violating the Unruh Civil Rights Act;

FIRST AMENDED COMPLAINT

1 registration process readily accessible to and usable by deaf and hard of
 2 hearing persons;

3 E. Declare that eBay created its seller registration process in a manner that
 4 discriminates against deaf and hard of hearing persons and fails to provide
 5 access for persons disabilities, as required by law;

6 F. An order certifying this case as a class action on behalf of the Class defined
 7 above; appointing Melissa J. Earll as class representative; and appointing her
 8 counsel as class counsel;

9 G. Award of the maximum actual damages allowed by law;

10 H. Award of the maximum treble damages allowed by law;

11 I. Award of the maximum statutory damages allowed by law;

12 J. Award Plaintiff and the Class their reasonable litigation expenses and
 13 attorneys' fees;

14 K. Award Plaintiff and the Class pre- and post-judgment interest, to the extent
 15 allowable;

16 L. Enter injunctive and/or declaratory relief as necessary to protect the interests
 17 of Plaintiff and the Class; and,

18 M. Award such other and further relief as equity and justice may require.

19 **JURY TRIAL**

20 93. Plaintiff demands a trial by jury for all issues so triable.

21
 22 Dated: April 13, 2011

Respectfully submitted,

23 s/ Michael Aschenbrener
 24 Michael Aschenbrener
 25 EDELSON MCGUIRE, LLC
 26
 27
 28

E-Filed 9/7/2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MELISSA J. EARLL, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

eBAY, INC. a Delaware corporation,

Defendant.

Case Number 5:11-cv-00262-JF (HRL)

**ORDER¹ DENYING WITHOUT
PREJUDICE MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT**

[Re: Docket No. 47]

Pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiff Melissa J. Earll (“Earll”) seeks leave to file her first amended complaint (“FAC”) in order to withdraw her claim under the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“the UCL”) and to add a claim under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.* (“Unruh”). Defendant eBay, Inc. (“eBay”) opposes the motion, asserting that amendment would be futile. The Court having considered the parties’ submissions and oral arguments of counsel presented at the hearing on August 5, 2011, the motion will be denied without prejudice.

I. BACKGROUND

Earll, who is hearing impaired, brings this putative class action against eBay, asserting that eBay’s seller verification system is inaccessible to the deaf community. Compl. ¶ 15. She

¹ This disposition is not designated for publication in the official reports.

1 alleges that she attempted to register as a seller on eBay.com but was unable to do so because
2 eBay required that she verify her identity through an automated, telephonic verification process.
3 *Id.* ¶¶ 16-34. As a resident of Missouri, Earll filed the putative class action on March 16, 2010,
4 in the Western District of Missouri. In her original complaint Earll asserts claims pursuant to the
5 Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (“the ADA”), the California
6 Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.* (“the DPA”), and the UCL. As explained
7 above, the proposed FAC would add an Unruh Act claim and withdraw Earll’s claim for relief
8 under the UCL. In addition, it would supplement Earll’s ADA and DPA claims with additional
9 information.

10 On January 19, 2011, the case was transferred to this district. Subsequently, eBay filed a
11 motion to dismiss the original complaint, and a hearing was set for May 13, 2011. By the
12 parties’ stipulation, the hearing date was vacated in order that the Court could hear the instant
13 motion for leave to amend before ruling on the motion to dismiss.

14 II. LEGAL STANDARD

15 Fed. R. Civ. P. 15(a) provides that “[t]he court should freely give leave when justice so
16 requires.” Absent any “apparent or declared reason—such as undue delay, bad faith or dilatory
17 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
18 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility
19 of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Foman v.*
20 *Davis*, 371 U.S. 178, 182 (1962). Rule 15 thus embraces “the principle that the purpose of
21 pleading is to facilitate a proper decision on the merits.” *Id.* at 181-82 (quoting *Conley v.*
22 *Gibson*, 355 U.S. 41, 48 (1957)). In short, the policy permitting amendment is to be applied with
23 “extreme liberality.” *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.
24 2003) (citation omitted). Factors which merit departure from the usual “[l]iberality in granting a
25 plaintiff leave to amend” include bad faith and futility. *Bowles v. Reade*, 198 F.3d 752, 757 (9th
26 Cir. 1999). Undue delay, standing alone, is insufficient to justify denial of a motion for leave to
27 amend. *Id.* at 758.

III. ANALYSIS

A. Standing

As a preliminary matter, eBay contends that as an out-of-state resident, Earll cannot seek the relief provided by the DPA and the Unruh Act. In response, Earll relies on a recent decision in *Valentine v. NebuAd*, 08-cv-5113 (THE), 2011 WL 1296111 (N.D. Cal. Apr. 4, 2011), which held that out-of-state residents may bring actions against in-state residents under California statutes when the statute provides relief to “all persons” generally. eBay asserts that *Valentine* directly contradicts long-standing authority from the California Supreme Court, holding that all California statutes shall be interpreted to provide relief only for California residents unless otherwise stated. *N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (1916).

Here, public policy weighs in favor of allowing Earll to pursue her state law claims. Earll is litigating in California only because eBay sought to transfer the action from Earll’s home state of Missouri. Moreover, in moving for transfer of venue, eBay relied upon the forum selection clause in its user agreement, which provides that the agreement “be governed in all respects by the laws of the State of California as they apply to agreements entered into and to be performed entirely within California by California residents.” Armbruster Decl. ISO Mot. to Dismiss or Alternatively to Transfer Venue, Ex. B, Dkt. 15.

B. Futility

eBay argues that the motion must be denied because amendment would be futile. According to eBay, Earll’s DPA claim and her proposed Unruh Act claim both fail because they are wholly derivative of her ADA claim, which itself is not actionable because the eBay website is not a place of public accommodation within the meaning of the ADA. Title III of the ADA prohibits discrimination in public accommodations. In order to prevail on a discrimination claim under Title III, a plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied a public accommodation by the defendant because of her disability. *Ariz. ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 670 (9th Cir. 2010). Under controlling Ninth Circuit authority, “places of public accommodation” under the

ADA are limited to actual physical spaces. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). Thus, eBay is correct in arguing that the ADA cannot afford a remedy to Earll in this case.

However, this conclusion does not render the action meritless. Earll may be able to pursue her remaining claims if they are asserted as independent claims separate from the alleged ADA violations. The Unruh Act provides that, “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their ... disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civ. Code § 51(b). The DPA guarantees that “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . places of public accommodation, amusement, or resort, and other places to which the general public is invited.” *Id.* at § 54.1(a)(1).

A violation of the Unruh Act may be maintained independent of an ADA claim where a plaintiff pleads “intentional discrimination in public accommodations in violation of the terms of the Act.” *Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 668 (2009) (quoting *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1175 (1991)). An independent DPA claim requires a showing that accessibility regulations promulgated under California law exceed those set by the ADA. Cal. Civ. Code § 54.1(a)(3); *See Urhausen v. Longs Drug Stores Cal., Inc.*, 155 Cal.App.4th 254, 263 (2007) (holding that “full and equal access” is defined by § 54.1 to mean access that complies with the regulations developed under the ADA, or under state statutes, if the latter impose a higher standard.”). Both the Unruh Act and the DPA apply to websites “as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively. No nexus to . . . physical [places] need be shown.” *National Federation of Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1196 (N.D. Cal. 2007).

Earll contends that her DPA and Unruh Act claims are not derivative of her ADA claim. She maintains that on its face the DPA imposes a higher burden on eBay than does the ADA because the language of the DPA “is broader than that of the ADA.” *Id.* However, the DPA is not a freestanding statute. To succeed on a DPA claim, a plaintiff must point to separate

California state regulations that prescribe higher accessibility standards than the ADA. *Id.* at 1207. Nor can an alleged violation of the Unruh Act, by itself, support a DPA claim. The Unruh Act does not establish standards for accessibility; rather it amounts to a prohibition against discrimination generally. In order to state an independent DPA claim, Earll would need to allege in effect a particular provision or regulation under California law that “requires higher standards of website accessibility than the ADA. . .” *Id.*

With respect to her Unruh Act claim, Earll argues that she has pled intentional discrimination sufficiently. In the proposed FAC, she alleges that eBay affirmatively discriminates against the deaf and that “eBay has gone out of its way to design a system that deaf and hard of hearing persons cannot use.” FAC ¶ 40. She also alleges that eBay refuses to implement “easy and inexpensive” solutions “being used by thousands of companies online.” *Id.* ¶ 42. However, these allegations are conclusory and lack the requisite factual support to make out a plausible claim for intentional discrimination. Although Earll alleges multiple instances of one-on-one contact with eBay in which eBay representatives suggested that she “enlist the help of a hearing person,” these allegations are offset by other alleged communications in which eBay representatives informed her that she “would be able to verify her identity through the ‘Live Help’ function [on eBay’s website].” *Id.* ¶¶ 20, 25, 27, 29, 31.

That Earll did not succeed in verifying her identity through these alternative means does not reasonably imply that eBay was unwilling or unable to remedy the situation. As described in the proposed pleading, eBay’s actions do not necessarily amount to an intentional denial of access to a public accommodation. An amended complaint setting forth additional specificity is needed.

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IV. ORDER

There is no indication that Earll's proposed amendments reflect any measure of bad faith or undue delay. Nor can eBay credibly claim that any substantial prejudice would result from such amendments. Accordingly, the motion for leave to file a first amended complaint is DENIED WITHOUT PREJUDICE. Earll shall file an amended complaint consistent with this order not later than thirty (30) days from the date of this order. The pending motion to dismiss is hereby terminated as moot.

IT IS SO ORDERED.

DATED: September 6, 2011


JEREMY FOGEL
United States District Judge

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MELISSA J. EARLL, individually and on
 behalf of all others similarly situated,

Plaintiff,

v.

EBAY INC., a Delaware corporation,
 Defendant.

) Case No. 5:11-cv-262-EJD

) **FIRST AMENDED COMPLAINT FOR:**

1. Violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12182;
2. Violations of the California Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.*; and,
3. Violations of the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.*

) CLASS ACTION

) JURY TRIAL DEMANDED

) Original Complaint filed: March 16, 2010

1 Plaintiff, by and through her attorneys, upon personal knowledge as to herself and her
2 own acts and upon information and belief as to all other matters, alleges as follows:

4 NATURE OF THE ACTION

5 1. Plaintiff Melissa J. Earll, a profoundly deaf person, brings this action on
6 behalf of herself and all others similarly situated against defendant eBay Inc. (“eBay” or
7 “Defendant”) for eBay’s unlawful practice of excluding persons who are deaf or hard of
8 hearing from selling items on eBay.com.

9 2. eBay requires sellers to verify their identities in order to sell items on
10 eBay.com. To do so, eBay places an automated phone call to the would-be seller during the
11 online registration process and requires the would-be seller to verify her identity by listening
12 to a spoken PIN code or password and then inputting that PIN code or password online.

13 3. Plaintiff, as a deaf person, cannot hear PIN codes spoken over the telephone.
14 eBay does not offer an alternative method of identity verification despite Plaintiff’s repeated
15 requests to accommodate her on account of her disability, and despite readily available
16 alternative verification tools and technologies. As a result of eBay’s intentionally
17 discriminatory conduct, Plaintiff is not able to verify her identity with eBay and is thus not
18 able to sell items on eBay.

19 4. Accordingly, eBay has violated and continues to violate the American with
20 Disabilities Act (“ADA”), the California Disabled Persons Act (“DPA”), and the California
21 Unruh Civil Rights Act with respect to deaf and hard of hearing persons.

23 PARTIES

24 5. Plaintiff Melissa J. Earll is a resident of the city of Nevada in Vernon County,
25 Missouri.

26 6. Defendant eBay Inc. is the world’s self-described largest online marketplace
27 with 94 million registered users buying and selling \$62 billion worth of goods annually. eBay
28

1 Inc. is a Delaware corporation headquartered in San Jose, California. eBay Inc. does business
2 throughout the state of California, and the nation.

4 JURISDICTION AND VENUE

5 7. This Court has jurisdiction over the subject matter of this action pursuant to
6 28 U.S. § 1331.

7 8. Personal jurisdiction and venue are proper because eBay is a corporation
8 headquartered in Santa Clara County and/or because the improper conduct alleged herein
9 occurred in, was directed from, and/or emanated or exported from California.

11 FACTUAL BACKGROUND

12 9. According to the Survey of Income and Program Participation (“SIPP”)
13 conducted by the U.S. Census Bureau, there are approximately 1 million deaf persons and
14 nearly 10 million hard of hearing persons in the United States.

16 FACTS RELATING TO EBAY

17 10. In 2010, eBay Inc. reported revenue of \$9.2 billion and income of \$1.8 billion.

18 11. Despite making billions of dollars annually, eBay has not implemented a
19 system that allows deaf or hard of hearing persons to register as sellers with eBay.

20 12. In order to register as a seller with eBay, one must provide eBay with a phone
21 number. eBay then calls that number to verify the identity of the registering individual.
22 During the aural verification process, eBay’s automated system speaks a password or PIN to
23 the prospective eBay seller. The prospective eBay seller then enters the PIN online to
24 complete the registration process.

25 13. At all times relevant, eBay has not provided an alternative to automated, aural
26 telephone use for deaf or hard of hearing persons.

27 14. Because deaf and hard of hearing persons are not able to verify their identities
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1 or receive PINs via telephone, eBay's verification system discriminates against deaf and hard
2 of hearing persons in violation of the ADA, the DPA, and the Unruh Civil Rights Act.

3 15. eBay's User Agreement, which it unilaterally drafted, states in relevant part:

4 Law and Forum for Legal Disputes - This Agreement shall be
5 governed in all respects by the laws of the State of California as
6 they apply to agreements entered into and to be performed entirely
7 within California between California residents, without regard to
8 conflict of law provisions. You agree that any claim or dispute you
9 may have against eBay must be resolved exclusively by a state or
10 federal court located in Santa Clara County, California, except as
otherwise agreed by the parties or as described in the Arbitration
Option paragraph below. You agree to submit to the personal
jurisdiction of the courts located within Santa Clara County,
California for the purpose of litigating all such claims or disputes.

11 16. Per eBay's User Agreement, Plaintiff's agreement with eBay and her
12 interactions with eBay are subject to California law.

13 17. Per eBay's User Agreement, Plaintiff is to be treated as a resident of
14 California for purposes of all legal disputes, including this lawsuit.

15 18. eBay successfully relied on this clause in moving to transfer this case from the
16 U.S. District Court for the Western District of Missouri to the present court, the U.S. District
17 Court for the Northern District of California.

18 19. eBay should be judicially estopped from arguing that California laws do not
19 apply to this dispute or to Plaintiff. Having formally taken the position in this case that its
20 "Law and Forum for Legal Disputes" provision applies to this matter and to Plaintiff, eBay
21 may not now assert an inconsistent position.

22 20. eBay.com is not an Internet-only business; it also provides a nexus to physical
23 locations. eBay stated in a recent press release that "eBay.com now offers consumers a one-
24 stop destination for deals, both online and in [brick-and-mortar] stores nearby. Through Milo
25 integration, consumers have even more choice now, with access to millions of products from
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1 approximately 50,000 stores across all 50 states in the U.S.”¹ The press release continues:
2 “eBay shoppers can now use a new local shopping tab to check a product’s local, or in-store,
3 availability directly from the eBay search results page. In addition product pages for several
4 product categories include a local shopping tab so shoppers can find the exact product they
5 want, whether it’s online or at a local retailer near them.” The release concludes: “[r]etailers
6 have been thrilled with the local shopping features on eBay, which really help drive more
7 people into their stores to buy products.”

8 21. All of this is part of eBay’s Local initiative, which allows consumers to use
9 eBay to shop online and in physical stores.²

10 22. In other words, Internet-based and local store-based shopping are fully
11 integrated throughout eBay.com. As a result, eBay.com is not merely an Internet business,
12 but also an extension of thousands of physical stores throughout the country. eBay expressly
13 and literally serves as a nexus between the online and offline shopping worlds. Accordingly,
14 there is no longer a distinction on eBay.com between buying online and in the physical
15 world—it is all one.

16 23. By discriminating against deaf and hard of hearing persons in their use of
17 eBay.com, eBay discriminates against those persons in their use of online places of public
18 accommodation and physical places of public accommodation.

19 20 **FACTS RELATING TO PLAINTIFF EARLL**

21 24. Plaintiff is diagnosed as profoundly deaf, the most severe categorization of
22 deafness. The categories of deafness in increasing order of severity are mild, moderate,
23 moderately severe, severe, and profound.

24
25 ¹ eBay’s Local Shopping Experts Discuss New Local Initiatives,
26 http://www.ebayinc.com/press_releases#ebays_local_shopping_experts_discuss_new, April
21, 2011, last accessed on October 5, 2011.

27 ² <http://www.ebay.com/local>, last accessed on October 5, 2011.
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1 25. On June 23, 2008, Plaintiff unsuccessfully attempted to register to sell certain
2 items via eBay.com.

3 26. During the online registration process, after completing the description for the
4 item(s) she wished to sell on eBay, she was prompted to provide a phone number to eBay so
5 that eBay could place an automated phone call to Plaintiff to verify her identity. During that
6 call, a computer would speak a PIN code or password, which the listener would then input
7 online.

8 27. Because Plaintiff cannot hear, she is not able to verify her identity or receive a
9 PIN via telephone. eBay provided Plaintiff with no alternative means of identity verification,
10 despite her requests.

11 28. Plaintiff, with no prompting by eBay to do so, clicked on the “Live Help”
12 feature on the product listing page to inquire via live Internet chat about an alternative to
13 receiving a telephone call for verifying her identity. The eBay representative, Shannon C.,
14 did not provide an alternative means for Plaintiff to verify her identity.

15 29. On June 23, 2008, Plaintiff wrote to the eBay Trust & Safety team via email
16 to request that the block on her account be removed so that she could complete the
17 registration process and begin selling items on eBay.

18 30. On June 24, 2008, Plaintiff received a seemingly automated response to her
19 email from Randy S. at eBay Customer Support. The response did not in any way relate to
20 the voice verification process or her request to have the block on her account removed. The
21 response referred to a “page not responding error.”

22 31. On July 7, 2008, Plaintiff attempted to verify her identity through the “eBay
23 Account Security Live Help!” During her live chat session on July 7, an eBay representative
24 identified as Shayne informed Plaintiff that eBay would only verify her identity by phone.
25 “The system is designed for us to send your PIN through a phone call. I apologize but we
26 will not be able [to] use a different method Melissa. . . . We can give you a PIN through a
27 phone call. Some account restrictions or issues can only be solved through a phone call and is
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1 [sic] one of those case [sic] Melissa.”

2 32. On July 7, 2008, Plaintiff emailed eBay Customer Support again to request an
3 alternative means of identity verification so that she could complete the seller registration
4 process.

5 33. On July 13, 2008, Plaintiff received a form email from the eBay Account
6 Security Team prompting Plaintiff to use the Live Help function (which had already failed
7 her) to solve any problems. The generic email was not directed toward and did not reference
8 her specific issue.

9 34. Plaintiff responded to this latest unhelpful email and reiterated her disability
10 and specific concerns in no uncertain terms.

11 35. On August 4, 2008, Plaintiff received a response via email from Lily M. of
12 eBay Customer Support. Lily M. advised Ms. Earll that she forwarded Plaintiff’s email to the
13 “appropriate team.” Ms. Earll never heard from the appropriate team. In fact, Ms. Earll never
14 heard from anyone at all at eBay regarding this matter.

15 36. Plaintiff again unsuccessfully attempted to register to sell items on eBay.com
16 in or about December 2009. This attempt was unsuccessful for the same reason described
17 above: she was required but unable on account of her disability to verify her identity by
18 telephone.

19 37. Plaintiff was never able to register with eBay as a seller and thus prevented
20 from using eBay’s services solely because of her disability. Plaintiff was never provided any
21 reason other than her disability for being prevented from registering as a seller.

22 38. Plaintiff’s interactions with eBay regarding her disability demonstrate the
23 intentional nature of eBay’s discrimination toward Plaintiff and Class members.

24 39. All of Plaintiff’s interactions with eBay took place within the state of
25 California.

EBAY'S VERIFICATION SYSTEM IS INTENTIONALLY DISCRIMINATORY

40. eBay has taken affirmative steps to discriminate against deaf and hard of hearing persons by creating a system that they cannot use. The basis of this suit is not that eBay has passively failed to accommodate deaf and hard of hearing persons. Rather, the basis of the suit is that eBay has gone out of its way to design a system that deaf and hard of hearing persons cannot use. In short, eBay intentionally discriminates against deaf and hard of hearing persons.

41. By creating a seller registration system that requires hearing ability and that provides no alternative, eBay has erected a barrier to its website that screens out or tends to screen out deaf and hard of hearing persons.

42. What makes eBay's discriminatory conduct all the more galling is that solutions to this problem are readily available. eBay simply needs to implement a seller registration system that utilizes PINs presented visually and aurally.

43. For example, upon information and belief, chase.com, a website for JPMorgan Chase & Co., requires registration and identity verification for use of certain parts of its website. Like eBay, chase.com requires authentication within the website and outside of the website. While eBay's off-website authentication is only phone call-based, chase.com allows users to choose from phone calls, text messages, and emails for off-website authentication.

44. In all likelihood, eBay could fix the disability access problems alleged herein by implementing a system similar to that used by chase.com: allow the registering seller to choose whether to receive a phone call, a text message, or an email for off-site identity verification. This method even serves both deaf and visually impaired users. eBay's unwillingness to utilize readily available systems to accommodate deaf and hard of hearing users further demonstrates eBay's discriminatory intent.

CLASS ALLEGATIONS

45. Plaintiff Earll brings this action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2),

1 and 23(b)(3) on behalf of herself and a class of similarly situated persons: *all persons who*
2 *are deaf or hard of hearing in the United States who have attempted to register as sellers*
3 *with eBay and as a result have been prevented from doing so because of eBay's telephone*
4 *aural verification system.* Excluded from the Class are Defendant, their legal representatives,
5 assigns, and successors, and any entity in which Defendant has a controlling interest. Also
6 excluded is the judge to whom this case is assigned and the judge's immediate family.

7 46. The Class consists of thousands of individuals and other entities, making
8 joinder impractical.

9 47. The claims of Plaintiff are typical of the claims of all of the other members of
10 the Class.

11 48. Plaintiff will fairly and adequately represent and protect the interests of the
12 other members of the Class. Plaintiff has retained counsel with substantial experience in
13 prosecuting complex litigation and class actions. Plaintiff and her counsel are committed to
14 vigorously prosecuting this action on behalf of the members of the Class, and have the
15 financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to
16 those of the other members of the Class.

17 49. Absent a class action, most members of the Class would find the cost of
18 litigating their claims to be prohibitive and will have no effective remedy. The class
19 treatment of common questions of law and fact is also superior to multiple individual actions
20 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
21 promotes consistency and efficiency of adjudication.

22 50. eBay has acted and failed to act on grounds generally applicable to Plaintiff
23 and the other members of the Class, requiring the Court's imposition of uniform relief to
24 ensure compatible standards of conduct toward the members of the Class.

25 51. The factual and legal bases of eBay's liability to Plaintiff and to the other
26 members of the Class are the same, resulting in injury to Plaintiff and all of the other
27 members of the Class. Plaintiff and the other members of the Class have all suffered harm as
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1 a result of eBay's wrongful conduct.

2 52. There are many questions of law and fact common to the claims of Plaintiff
3 and the other members of the Class, and those questions predominate over any questions that
4 may affect individual members of the Class. Common questions for the Class include but are
5 not limited to the following: whether eBay's conduct described herein violates the ADA, 42
6 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and 12182(b)(2)(A)(i)-(iv); whether eBay's conduct
7 described herein violates the DPA, Cal. Civ. Code §§ 54 *et seq.*; and, whether eBay's
8 conduct described herein violates the California Unruh Civil Rights Act, Cal. Civ. Code
9 §§ 51 *et seq.*

11 FIRST CAUSE OF ACTION

12 Violation of the ADA, 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and (b)(2)(A)(i)-(iv) 13 (on behalf of Plaintiff and the Class)

14 53. Plaintiff incorporates by reference the foregoing allegations.

15 54. Section 12182(a) of the ADA states:

16 No individual shall be discriminated against on the basis of
17 disability in the full and equal enjoyment of the goods, services,
18 facilities, privileges, advantages, or accommodations of any place
19 of public accommodation by any person who owns, leases (or
leaves to), or operates a place of public accommodation.

20 55. Sections 12181(7)(D) & (E) defines private entities, like eBay, as places of
21 public accommodation to include a "place of public gathering" and "a bakery, grocery store,
22 clothing store, hardware store, shopping center, or other sales or rental establishment" when
23 they affect commerce. Section 12181(7) does not expressly limit places of public
24 accommodation to brick- and-mortar operations, nor does it expressly preclude Internet-
25 based operations.

26 56. Section 12181(1) defines commerce as "travel, trade, traffic, commerce,
27 transportation, or communication—among the several States; between any foreign country or
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any territory or possession and any State; or between points in the same State but through another State or foreign country.”

57. eBay describes itself in the following manner:

With more than 94 million active users globally, eBay is the world's largest online marketplace, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. Their collective impact on e-commerce is staggering: In 2010, the total worth of goods sold on eBay was \$62 billion -- more than \$2,000 *every second*.

58. As a for-profit entity facilitating \$62 billion in sales of goods annually in and among the several States and internationally, eBay affects commerce, as defined in 42 U.S.C. § 12181(1).

59. As “the world’s largest online marketplace, where practically anyone can buy and sell practically anything” and by “connect[ing] a diverse and passionate community,” eBay is a “place of public gathering,” as well as a “shopping center” as defined in 42 U.S.C. §§ 12181(7)(D) & (E).

60. eBay lists its categories of items for sale at <http://shop.ebay.com/allcategories/all-categories>. These categories include “Clothing, Shoes & Accessories” and “Tools & Home Improvement,” among dozens of others, which correlate to the “clothing store” and “hardware store” definitions in 42 U.S.C. § 12181(7)(E). And with tens of millions of items for sale at any given moment, eBay is the epitome of a “shopping center, or other sales or rental establishment,” as defined in § 12181(7)(E).

61. Accordingly, eBay is a “place of public accommodation,” as defined in 42 U.S.C. §§ 12181(7) & 12182(a).

62. Sections 12182(b)(1)(A)(i)-(iii) state in relevant part that it shall be discriminatory to deny participation to, require participation of an unequal benefit, or provide a separate benefit to an individual or a class of individuals on the basis of a disability or disabilities.

63. Section 12182(b)(2)(A)(i) states that discrimination includes “the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability from fully and equally enjoying the goods, services, facilities, privileges, advantages, or accommodations unless necessary for the provision” thereof.

64. eBay violates this section by imposing upon would-be eBay sellers a registration process that screens out deaf and hard of hearing persons.

65. Section 12182(b)(2)(A)(ii) states that discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . . ”

66. eBay violates this section by failing to make reasonable accommodations to its registration process necessary to afford deaf and hard of hearing persons access to eBay’s services, facilities, privileges, advantages, and accommodations.

67. Section 12182(b)(2)(A)(iii) states that discrimination includes “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . . ”

68. eBay violates this section by failing to take the necessary steps to ensure that deaf and hard of hearing persons are not excluded, denied services, segregated, or treated differently during the seller registration process.

69. Section 12182(b)(2)(A)(iv) states that discrimination includes “a failure to remove . . . communication barriers . . . where such removal is readily achievable.”

70. eBay violates this section by failing to remove communication barriers—namely the aural verification system—from the seller registration process despite the availability of readily achievable alternatives.

71. As alleged herein, eBay facilitates offline shopping as well as the online shopping for which it is so well known. At eBay.com, offline and online shopping are

1 inextricably linked. Thus, eBay prevents Plaintiff on account of her being deaf from selling
 2 both online and offline/locally via eBay.com. In other words, eBay's discriminatory conduct
 3 limits Plaintiff's access to both online places of public accommodation and places of public
 4 accommodation in the physical world.

5 6 **SECOND CAUSE OF ACTION**

7 **Violation of the California Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.***

8 **(on behalf of Plaintiff and the Class)**

9 72. Plaintiff incorporates by reference the foregoing allegations.

10 73. The Disabled Persons Act ("DPA") states that "[i]ndividuals with disabilities
 11 shall be entitled to full and equal access, as other members of the general public, to
 12 accommodations, advantages, facilities, medical facilities, including . . . places to which the
 13 general public is invited, subject only to the conditions and limitations established by law, or
 14 state or federal regulation, and applicable alike to all persons." Cal. Civ. Code § 54.1(a)(1).

15 74. Section 54.1(a)(3) states that "'full and equal access,' for purposes of this
 16 section in its application to transportation, means access that meets the standards of Titles II
 17 and III of the Americans with Disabilities Act of 1990 and federal regulations adopted
 18 pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean
 19 access that meets those higher standards." (Citations omitted.)

20 75. The DPA does not otherwise define "full and equal access" for applications
 21 other than transportation.

22 76. Regardless, "the laws of this state prescribe higher standards" than the ADA
 23 because the DPA and the Unruh Act both have been interpreted to apply to websites even
 24 absent a nexus to physical locations, while the ADA has been interpreted by some courts to
 25 require a nexus between websites and physical locations.

26 77. Section 54.1(a)(3) does not state that higher standards than the ADA apply
 27 only if prescribed by state laws *other* than the DPA. In other words, the DPA itself may
 28

1 prescribe higher standards that eBay must meet.

2 78. The DPA and the Unruh Act are the two exclusive state laws regulating
3 disability access for private entities applicable to this case. Thus, there are no other statutes
4 or regulations on which the DPA may rely in this case.

5 79. Both the DPA and the Unruh Act require disability access for websites to
6 which the general public is invited.

7 80. The “general public is invited” to sell on eBay.com. As eBay itself states,
8 eBay.com is the place “where practically anyone can buy and sell practically anything.”
9 eBay.com thus constitutes a “public place” within the meaning of the DPA. Thus, the DPA
10 and the Unruh Act require that eBay.com be accessible to deaf and hard of hearing persons.

11 81. Deafness and hardness of hearing are disabilities as defined in Cal. Govt.
12 Code § 12926.

13 82. By denying access to eBay’s selling services to deaf and hard of hearing
14 persons, eBay, as a California business, is denying Plaintiff and Class members full and
15 equal access to the accommodations, advantages, and facilities of eBay.com in violation of
16 the DPA.

17 83. Additionally, Section 54(c) states that “[a] violation of the right of an
18 individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also
19 constitutes a violation of this section.”

20 84. As alleged above, eBay is violating the ADA; thus, it is—for this separate and
21 independent reason from those articulated above—also violating the DPA. For the sake of
22 clarity, Plaintiff alleges both ADA-independent and ADA-dependent violations of the DPA.

23 85. Plaintiff and Class members are entitled to injunctive relief to remedy the
24 discrimination.

25 86. Section 54.3 explicitly states that “*any* person denied any of the rights
26 provided in Sections 54, 54.1, and 54.2” (emphasis added) may bring suit.

27 87. Under § 54.3, Plaintiff and Class members are entitled to actual damages,
28

1 treble damages, and statutory damages for each offense, plus attorneys' fees.

2 3 **THIRD CAUSE OF ACTION**

4 **Violation of the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.***

5 **(on behalf of Plaintiff and the Class)**

6 88. Plaintiff incorporates by reference the foregoing allegations.

7 89. Cal. Civ. Code § 51(b) states:

8 All persons within the jurisdiction of this state are free and equal,
9 and no matter what their sex, race, color, religion, ancestry,
10 national origin, disability, medical condition, marital status, or
11 sexual orientation are entitled to the full and equal
accommodations, advantages, facilities, privileges, or services in
all business establishments of every kind whatsoever.

12 90. Cal. Civ. Code § 51.5(a) states:

13 No business establishment of any kind whatsoever shall
14 discriminate against, boycott or blacklist, or refuse to buy from,
15 contract with, sell to, or trade with any person in this state on
16 account of any characteristic listed or defined in subdivision (b) or
17 (e) of Section 51, or of the person's partners, members,
18 stockholders, directors, officers, managers, superintendents,
agents, employees, business associates, suppliers, or customers,
because the person is perceived to have one or more of those
characteristics, or because the person is associated with a person
who has, or is perceived to have, any of those characteristics.

19 91. Cal. Civ. Code § 51.5(b) defines "person" to include "any person, firm,
20 association, organization, partnership, business trust, corporation, limited liability company,
21 or company.

22 92. Deafness and hardness of hearing are disabilities as defined in Cal. Govt.
23 Code §§ 12926 and 12926.1.

24 93. By denying access to eBay's selling services to deaf and hard of hearing
25 persons, eBay is denying Plaintiff and Class members full and equal access to the
26 accommodations, advantages, and facilities, privileges, or services of eBay.com in violation
27 of § 51.

1 94. By discriminating against Plaintiff on account of her disability, eBay is
2 violating § 51.5.

3 95. eBay is a “business establishment” within the meaning of § 51. Selling
4 services on eBay.com are inaccessible to deaf and hard of hearing patrons. This
5 inaccessibility denies deaf and hard of hearing patrons full and equal access to the facilities,
6 goods, and services that eBay makes available to the non-disabled public. eBay is violating
7 the Unruh Act in that eBay is denying deaf and hard of hearing customers the ability to sell
8 on eBay.com. Upon information and belief, these violations are ongoing.

9 96. eBay’s actions constitute intentional discrimination against the class on the
10 basis of a disability in violation of the Unruh Act in that: eBay has constructed a website that
11 is inaccessible to Plaintiff and Class members; maintains the website in this inaccessible
12 form; and has failed to take actions to correct these barriers even after being notified of the
13 discrimination that such barriers cause.

14 97. Additionally, § 51(f) states that “[a] violation of the right of any individual
15 under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute
16 a violation of this section.

17 98. As alleged above, eBay is violating the ADA; thus, it is—for this separate and
18 independent reason from those articulated above—also violating § 51. For the sake of clarity,
19 Plaintiff alleges both ADA-independent and ADA-dependent violations of the Unruh Act.

20 99. Section 52 explicitly states that “*any* person denied the rights provided in
21 Section 51, 51.5, or 51.6” (emphasis added) may bring suit.

22 100. Under § 52(a), Plaintiff and Class members are entitled to actual damages
23 (both special and general damages), treble damages, and statutory damages for each and
24 every offense, plus attorneys’ fees.

25
26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following
28

1 relief:

- 2 A. A preliminary and permanent injunction prohibiting eBay from violating the
3 ADA;
- 4 B. A preliminary and permanent injunction prohibiting eBay from violating the
5 DPA;
- 6 C. A preliminary and permanent injunction prohibiting eBay from violating the
7 Unruh Civil Rights Act;
- 8 D. A preliminary and permanent injunction requiring eBay to make the seller
9 registration process readily accessible to and usable by deaf and hard of
10 hearing persons;
- 11 E. Declare that eBay created its seller registration process in a manner that
12 discriminates against deaf and hard of hearing persons and fails to provide
13 access for persons disabilities, as required by law;
- 14 F. An order certifying this case as a class action on behalf of the Class defined
15 above; appointing Melissa J. Earll as class representative; and appointing her
16 counsel as class counsel;
- 17 G. Award of the maximum actual damages allowed by law;
- 18 H. Award of the maximum treble damages allowed by law;
- 19 I. Award of the maximum statutory damages allowed by law;
- 20 J. Award Plaintiff and the Class their reasonable litigation expenses and
21 attorneys' fees;
- 22 K. Award Plaintiff and the Class pre- and post-judgment interest, to the extent
23 allowable;
- 24 L. Enter injunctive and/or declaratory relief as necessary to protect the interests
25 of Plaintiff and the Class; and,
- 26 M. Award such other and further relief as equity and justice may require.
- 27
- 28

JURY TRIAL

101. Plaintiff demands a trial by jury for all issues so triable.

Dated: October 5, 2011

Respectfully submitted,

s/ Michael Aschenbrener
Michael Aschenbrener
ASCHENBRENER LAW, P.C.

CERTIFICATE OF SERVICE

The undersigned certifies that, on October 5, 2011, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: October 5, 2011

ASCHENBRENER LAW, P.C.

By: s/ Michael Aschenbrener

Michael Aschenbrener

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

| | | |
|-------------------|---|-----------------------------------|
| MELISSA J. EARLL, |) | Case No.: 5:11-CV-00262-EJD |
| |) | |
| Plaintiff, |) | ORDER GRANTING DEFENDANT'S |
| |) | MOTION TO DISMISS FIRST |
| v. |) | AMENDED COMPLAINT |
| |) | |
| EBAY INC., |) | (Re: Docket No. 66) |
| Defendant. |) | |
| |) | |
| |) | |

Presently before the court is Defendant eBay Inc.'s ("eBay") Motion to Dismiss the First Amended Complaint ("FAC") filed by Plaintiff Melissa J. Earll ("Earll"), on behalf of herself and all others similarly situated. See Docket No. 66. Earll filed written opposition to the motion. See Docket No. 68. The court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing date. Subject matter jurisdiction in this court arises pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are proper because eBay is a corporation headquartered in Santa Clara County. Having fully reviewed the moving, opposing and reply papers filed by the parties, the court has determined eBay's motion should be GRANTED for the reasons described below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The allegations contained in this section are taken largely from the FAC. Earll, a Missouri resident who is deaf, attempted to use eBay's selling services on June 23, 2008. FAC, Docket No.

63, ¶¶ 24-25. Earll alleges she was unable to register as an eBay seller because eBay’s seller registration process includes a telephone verification component. Id. ¶¶ 26-27. For over six weeks, Earll repeatedly told eBay that she was deaf and that the procedures employed by eBay prevented her from registering as a seller. Id. ¶¶ 25-37. Earll participated in several “live chat” sessions and exchanged many emails with eBay representatives where she communicated with eBay representatives over the Internet, but none accommodated her request to register as a seller using an alternate means of verification. Id. ¶¶ 28, 31. Earll alleges eBay intentionally discriminated against hearing-impaired persons by creating a verification system they cannot use. Id. ¶ 40.

Earll filed the putative class action on March 16, 2010 in the Western District of Missouri. In her original complaint, Earll asserted claims pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (“ADA”) and the California Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.* (“DPA”).¹ See Docket No. 1. While the case was pending in Missouri, eBay moved to dismiss the case, or alternatively sought to transfer venue to the Northern District of California. See Docket Nos. 14-17. On January 4, 2011, the court in Missouri granted eBay’s motion to transfer venue, denied eBay’s motion to dismiss as moot, and ordered the case transferred to the Northern District of California. See Docket No. 28. After transfer to this court, eBay moved again to dismiss the case on April 8, 2011. See Docket No. 45.

Thereafter, Earll moved for leave to file an amended complaint, which advanced claims under the ADA and DPA, and also sought to add a claim under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.* (“Unruh Act”). See Docket No. 47. Judge Fogel denied Earll’s motion for leave to amend without prejudice, and dismissed eBay’s then-pending motion to dismiss as moot. Order, Docket No. 61, at 6:4-7. In denying Earll’s motion to file an amended complaint, Judge Fogel held that (1) the ADA could not afford a remedy to Earll in this case because eBay.com is not a place of public accommodation, but (2) Earll may be able to state an independent claim under the Unruh Act if she sufficiently pleaded intentional discrimination and (3) Earll may be able to

¹ Earll also filed a claim under the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, which she later withdrew in her FAC.

1 state independent claims under the DPA if she alleged a violation of a California law that requires
2 higher standards of website accessibility than the ADA. Order at 3:18-5:22. Earll had not done so
3 in her proposed amended complaint, but Judge Fogel granted Earll leave to file an amended
4 complaint consistent with his order.

5 On October 5, 2011, Earll filed her FAC alleging violations of the ADA, the DPA, and the
6 Unruh Act.

7 II. LEGAL STANDARD

8 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
9 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
10 rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
11 complaint which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state a
12 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
13 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a
14 cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.
15 2008).

16 When deciding whether to grant a motion to dismiss, the court must accept as true all “well-
17 pleaded factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). The court must also
18 construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915
19 F.2d 1242, 1245 (9th Cir. 1988). However, “courts are not bound to accept as true a legal
20 conclusion couched as a factual allegation.” Twombly, 550 U.S. at 555. Moreover, anything
21 beyond the pleadings generally may not be examined. Hal Roach Studios, Inc. v. Richard Feiner &
22 Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). But “material which is properly submitted as part of
23 the complaint may be considered.” Twombly, 550 U.S. at 555.

24 “Dismissal with prejudice and without leave to amend is not appropriate unless it is clear
25 that the complaint could not be saved by amendment.” Eminence Capital, LLC v. Aspeon, Inc.,
26 316 F.3d 1048, 1052 (9th Cir. 2003). “A district court's failure to consider the relevant factors and
27
28

articulate why dismissal should be with prejudice instead of without prejudice may constitute an abuse of discretion.” Id.

III. DISCUSSION

A. Violation of the ADA

To prevail on a discrimination claim under Title III of the ADA, a plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied a public accommodation by the defendant because of her disability. Ariz. ex. rel. Goddard v. Harkins Amusement Enters., 603 F.3d 666, 670 (9th Cir. 2010).

In denying Earll’s motion to amend, Judge Fogel found that, “[u]nder controlling Ninth Circuit authority, ‘places of public accommodation’ under the ADA are limited to actual physical spaces. Weyer v. Twentieth Century Fox Film Corp., 198 2 F.3d 1104, 1114 (9th Cir. 2000). Thus, eBay is correct in arguing that the ADA cannot afford a remedy to Earll in this case.” Order at 3:28-4:3. Judge Fogel granted Earll leave to file an amended complaint consistent with his Order.

Despite Judge Fogel’s Order, Earll alleged an ADA violation in the FAC. In opposing this motion to dismiss, Earll argues that Judge Fogel misinterpreted Weyer, or, alternatively, Weyer was incorrectly decided.

The ADA claim in the FAC is inconsistent with Judge Fogel’s Order and therefore exceeded the scope of Earll’s leave to amend the complaint. Additionally, Earll’s attempt to re-litigate whether eBay.com is a place of public accommodation is, in effect, a motion for reconsideration, which is not properly before the Court. See Civil L.R. 7–9; Wehlage v. EmpRes Healthcare Inc., 821 F. Supp. 2d 1122, 1134 (N.D. Cal. 2011) (observing that “attempts to re-litigate . . . the merits . . . are, in effect, motions for reconsideration . . .” and rejecting arguments on grounds that movant had failed to seek leave under Civ. L.R. 7-9(a)). Therefore, eBay’s motion to dismiss the ADA claim is GRANTED. Because Earll will not be able to overcome the fact that the ADA does not apply to eBay.com by amending her complaint, leave to amend is not appropriate.

B. Violation of the DPA

The DPA provides that “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . and privileges of all common carriers, . . . modes of transportation . . . , places of public accommodation, . . . and other places to which the general public is invited” Cal. Civ. Code §§ 54, 54.1(a)(1).

Judge Fogel recognized that Earll could still assert a DPA claim independent of her ADA claim, but to do so she “would need to allege in effect a particular provision or regulation under California law that requires higher standards of website accessibility than the ADA.” Order at 5:4-6 (internal citation and quotations omitted). “The DPA is not a freestanding statute. To succeed on a DPA claim, a plaintiff must point to separate California state regulations that prescribe higher accessibility standards than the ADA.” Id. at 4:27-5:1

Contrary to Judge Fogel’s Order, Earll did not allege a particular California provision or regulation requiring higher standards of website accessibility than the ADA in the FAC. Rather, Earll argues that Judge Fogel misinterpreted the DPA and that the DPA is a freestanding statute, which does not require a DPA claim be based on a separate California statute.

The DPA claim in the FAC is inconsistent with Judge Fogel’s Order and therefore exceeded the scope of Earll’s leave to amend the complaint. Additionally, Earll’s attempt to re-litigate whether the DPA requires that a plaintiff point to separate California state regulations that prescribe higher accessibility standards than the ADA is, in effect, a motion for reconsideration, which is not properly before the Court. See Civil L.R. 7–9(a); Wehlage, 821 F. Supp. 2d at 1134. If Earll seeks reconsideration Judge Fogel’s Order regarding this issue, she must comply with Civil Local Rule 7-9. Therefore, eBay’s motion to dismiss the DPA claim is GRANTED. Because Earll also alleges that “there are no other statutes or regulations on which the DPA may rely in this case,” leave to amend would be futile.

D. Violation of the Unruh Act

The Unruh Civil Rights Act provides that “[a]ll person within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civ. Code § 51(b). To plead an Unruh Act violation independent of an ADA claim, a plaintiff must allege “intentional discrimination in public accommodations in violation of terms of the Act.” Munson v. Del Taco, Inc., 46 Cal. 4th 661, 668 (2009) (quoting Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1175 (1991)). The California Supreme Court has concluded that the Act requires allegations of “willful, affirmative misconduct,” and that a plaintiff must allege more than the disparate impact of a facially neutral policy on a particular group. See Koebke v. Bernardo Heights Country Club, 36 Cal.4th 824, 854–54 (2005).

First, Earll argues that intentional discrimination may not be required to plead an independent Unruh Act violation. Judge Fogel previously held that “[a] violation of the Unruh Act may be maintained independent of an ADA claim where a plaintiff pleads ‘intentional discrimination in public accommodations in violation of the terms of the Act.’” Order at 4:13-15. Judge Fogel denied Earll’s motion to amend because Earll had not sufficiently pleaded facts showing intentional discrimination. Id. at 5:7-22. Earll’s attempt to re-litigate whether intent is a necessary element of an independent Unruh Act violation is essentially a motion for reconsideration, which is not properly before the Court, and therefore this argument fails.

Additionally, Earll argues that she has sufficiently pleaded intentional discrimination. Judge Fogel rejected Earll’s previous attempt to plead an Unruh Act claim because Earll’s allegations that “eBay has gone out of its way to design a system that deaf and hard of hearing persons cannot use” and refused to implement “easy and inexpensive” solutions “being used by thousands of companies online” were “[c]onclusory and lack[ed] the requisite factual support to make out a plausible claim for intentional discrimination.” Id. at 5:7-13. Judge Fogel further observed that Earll’s allegations that she was told by eBay representatives to “enlist the help of a hearing person” were offset by “other alleged communications in which eBay representatives informed her that she ‘would be able

1 to verify her identify through the Live help function [on eBay's website]' " Id. at 5:13-17. Judge
 2 Fogel concluded: "That Earll did not succeed in verifying her identity through these alternative
 3 means does not reasonably imply that eBay was unwilling or unable to remedy the situation" and
 4 that "[a]s described in [Earll's] proposed pleading, eBay's actions did not necessarily amount to an
 5 intentional denial of access to a public accommodation." Id. at 5:18-21.

6 Similar to Earll's proposed complaint, the FAC acknowledges that eBay generally
 7 "requires sellers to verify their identities in order to sell items on eBay.com" by "plac[ing] an
 8 automated phone call to the would-be seller" and "requir[ing] the would-be seller to verify her
 9 identify by listening to a spoken PIN code or password and then inputting that PIN code or
 10 password online." FAC ¶ 2. According to the FAC, eBay intentionally discriminated against Earll
 11 based on her disability by "construct[ing] a website that is inaccessible to [Earll] and Class
 12 members; maintain[ing] the website in this inaccessible form; and [failing] to take actions to
 13 correct these barriers even after being notified of the discrimination that such barriers cause."¹ Id. ¶
 14 96.

15 Earll's allegations describe a facially neutral verification process with a disparate impact on
 16 the deaf community, but they do not demonstrate intentional discrimination. Furthermore, the fact
 17 that Earll contacted eBay's customer service and unsuccessfully requested to have eBay's
 18 otherwise applicable procedures modified is not sufficient to state a plausible claim of intentional
 19 discrimination. FAC ¶¶ 27-35; Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1116 (N.D. Cal.
 20 2011) (dismissing Unruh Act claim where plaintiff alleged that Facebook customer service was
 21 difficult to use but did not allege that "Facebook treated her differently *because* of her disability,
 22 nor . . . that Facebook applies its policies in a way that *targets* individuals with disabilities."). In
 23

24 ¹ eBay argues that even if Earll pleads intentional discrimination, Earll's Unruh Act claim still must
 25 be dismissed because no modification can be required of its website. Specifically, eBay argues that
 26 the Unruh Act applies to websites as a kind of business establishment and neither section 51 nor
 27 51.5 of the Unruh Act shall be construed to "require any . . . modification of any sort . . . beyond
 28 [those] that [are] otherwise required by other provisions of law, to any new or existing
 establishment . . ." Cal Civ Code §§ 51(d) and 51.5(c). Assuming *arguendo* that Sections 51(d)
 and 51.5(c) applies to websites, eBay has not demonstrated that correcting the alleged barriers to
 accessing its website would require that eBay.com be modified. Thus, eBay's argument that the
 FAC be dismissed on this basis fails.

1 opposition to this motion, Earll argues that eBay designed and maintained its verification process
2 in this manner in order to accomplish its goal of discrimination and that she also has a viable Unruh
3 Act claim for discriminatory application. The FAC, however, does not allege facts supporting these
4 potential theories of intentional discrimination.

5 Thus, Earll does not sufficiently plead intentional discrimination. Therefore, eBay's motion
6 to dismiss Earll's Unruh Act claim is GRANTED WITH LEAVE TO AMEND.

7 IV. ORDER

8 Based on the foregoing, eBay's Motion to Dismiss the FAC is GRANTED WITHOUT
9 LEAVE TO AMEND as to Earll's ADA and DPA claims. eBay's Motion to Dismiss is
10 GRANTED WITH LEAVE TO AMEND as to Earll's Unruh Act claim. Any amended complaint
11 must be filed no later than 30 days from the filing of this order.

12 IT IS SO ORDERED.

13 Dated: August 8, 2012

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15 _____
16 EDWARD J. DAVILA
17 United States District Judge
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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MELISSA J. EARLL, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

EBAY INC., a Delaware corporation,
Defendant.

) Case No. 5:11-cv-262-EJD

)

) **SECOND AMENDED COMPLAINT FOR:**

)

1. Violations of the Americans with
Disabilities Act, 42 U.S.C. §§ 12182;
2. Violations of the California Disabled
Persons Act, Cal. Civ. Code §§ 54, *et*
seq.; and,
3. Violations of the California Unruh
Civil Rights Act, Cal. Civ. Code
§§ 51, *et seq.*

)

) CLASS ACTION

)

) JURY TRIAL DEMANDED

)

) Original Complaint filed: March 16, 2010

1 Plaintiff, by and through her attorneys, upon personal knowledge as to herself and her
2 own acts and upon information and belief as to all other matters, alleges as follows:

3
4 **NATURE OF THE ACTION**

5 1. Plaintiff Melissa J. Earll, a profoundly deaf person, brings this action on
6 behalf of herself and all others similarly situated against defendant eBay Inc. (“eBay” or
7 “Defendant”) for eBay’s unlawful practice of excluding persons who are deaf or hard of
8 hearing from selling items on eBay.com.

9 2. eBay requires sellers to verify their identities in order to sell items on
10 eBay.com. To do so, eBay places an automated phone call to the would-be seller during the
11 online registration process and requires the would-be seller to verify her identity by listening
12 to a spoken PIN code or password and then inputting that PIN code or password online.

13 3. Plaintiff, as a deaf person, cannot hear PIN codes spoken over the telephone.
14 eBay does not offer an alternative method of identity verification despite Plaintiff’s repeated
15 requests to accommodate her on account of her disability, and despite readily available
16 alternative verification tools and technologies. As a result of eBay’s intentionally
17 discriminatory conduct, Plaintiff is not able to verify her identity with eBay and is thus not
18 able to sell items on eBay.

19 4. Accordingly, eBay has violated and continues to violate the American with
20 Disabilities Act (“ADA”), the California Disabled Persons Act (“DPA”), and the California
21 Unruh Civil Rights Act with respect to deaf and hard of hearing persons.

22
23 **PARTIES**

24 5. Plaintiff Melissa J. Earll is a resident of the city of Nevada in Vernon County,
25 Missouri.

26 6. Defendant eBay Inc. is the world’s self-described largest online marketplace
27 with 94 million registered users buying and selling \$62 billion worth of goods annually. eBay
28

1 Inc. is a Delaware corporation headquartered in San Jose, California. eBay Inc. does business
2 throughout the state of California, and the nation.

4 JURISDICTION AND VENUE

5 7. This Court has jurisdiction over the subject matter of this action pursuant to
6 28 U.S. § 1331.

7 8. Personal jurisdiction and venue are proper because eBay is a corporation
8 headquartered in Santa Clara County and/or because the improper conduct alleged herein
9 occurred in, was directed from, and/or emanated or exported from California.

11 FACTUAL BACKGROUND

12 9. According to the Survey of Income and Program Participation (“SIPP”)
13 conducted by the U.S. Census Bureau, there are approximately 1 million deaf persons and
14 nearly 10 million hard of hearing persons in the United States.

16 FACTS RELATING TO EBAY

17 10. In 2010, eBay Inc. reported revenue of \$9.2 billion and income of \$1.8 billion.

18 11. Despite making billions of dollars annually, eBay has not implemented a
19 system that allows deaf or hard of hearing persons to register as sellers with eBay.

20 12. In order to register as a seller with eBay, one must provide eBay with a phone
21 number. eBay then calls that number to verify the identity of the registering individual.
22 During the aural verification process, eBay’s automated system speaks a password or PIN to
23 the prospective eBay seller. The prospective eBay seller then enters the PIN online to
24 complete the registration process.

25 13. At all times relevant, eBay has not provided an alternative to automated, aural
26 telephone use for deaf or hard of hearing persons.

27 14. Because deaf and hard of hearing persons are not able to verify their identities
28

1 or receive PINs via telephone, eBay's verification system discriminates against deaf and hard
2 of hearing persons in violation of the ADA, the DPA, and the Unruh Civil Rights Act.

3 15. eBay's User Agreement, which it unilaterally drafted, states in relevant part:

4 Law and Forum for Legal Disputes - This Agreement shall be
5 governed in all respects by the laws of the State of California as
6 they apply to agreements entered into and to be performed entirely
7 within California between California residents, without regard to
8 conflict of law provisions. You agree that any claim or dispute you
9 may have against eBay must be resolved exclusively by a state or
10 federal court located in Santa Clara County, California, except as
otherwise agreed by the parties or as described in the Arbitration
Option paragraph below. You agree to submit to the personal
jurisdiction of the courts located within Santa Clara County,
California for the purpose of litigating all such claims or disputes.

11 16. Per eBay's User Agreement, Plaintiff's agreement with eBay and her
12 interactions with eBay are subject to California law.

13 17. Per eBay's User Agreement, Plaintiff is to be treated as a resident of
14 California for purposes of all legal disputes, including this lawsuit.

15 18. eBay successfully relied on this clause in moving to transfer this case from the
16 U.S. District Court for the Western District of Missouri to the present court, the U.S. District
17 Court for the Northern District of California.

18 19. eBay should be judicially estopped from arguing that California laws do not
19 apply to this dispute or to Plaintiff. Having formally taken the position in this case that its
20 "Law and Forum for Legal Disputes" provision applies to this matter and to Plaintiff, eBay
21 may not now assert an inconsistent position.

22 20. eBay.com is not an Internet-only business; it also provides a nexus to physical
23 locations. eBay stated in a recent press release that "eBay.com now offers consumers a one-
24 stop destination for deals, both online and in [brick-and-mortar] stores nearby. Through Milo
25 integration, consumers have even more choice now, with access to millions of products from
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approximately 50,000 stores across all 50 states in the U.S.”¹ The press release continues: “eBay shoppers can now use a new local shopping tab to check a product’s local, or in-store, availability directly from the eBay search results page. In addition product pages for several product categories include a local shopping tab so shoppers can find the exact product they want, whether it’s online or at a local retailer near them.” The release concludes: “[r]etailers have been thrilled with the local shopping features on eBay, which really help drive more people into their stores to buy products.”

21. All of this is part of eBay’s Local initiative, which allows consumers to use eBay to shop online and in physical stores.²

22. In other words, Internet-based and local store-based shopping are fully integrated throughout eBay.com. As a result, eBay.com is not merely an Internet business, but also an extension of thousands of physical stores throughout the country. eBay expressly and literally serves as a nexus between the online and offline shopping worlds. Accordingly, there is no longer a distinction on eBay.com between buying online and in the physical world—it is all one.

23. By discriminating against deaf and hard of hearing persons in their use of eBay.com, eBay discriminates against those persons in their use of online places of public accommodation and physical places of public accommodation.

FACTS RELATING TO PLAINTIFF EARLL

24. Plaintiff is diagnosed as profoundly deaf, the most severe categorization of deafness. The categories of deafness in increasing order of severity are mild, moderate, moderately severe, severe, and profound.

¹ eBay’s Local Shopping Experts Discuss New Local Initiatives, http://www.ebayinc.com/press_releases#ebays_local_shopping_experts_discuss_new, April 21, 2011, last accessed on October 5, 2011.

² <http://www.ebay.com/local>, last accessed on October 5, 2011.

1 25. On June 23, 2008, Plaintiff unsuccessfully attempted to register to sell certain
2 items via eBay.com.

3 26. During the online registration process, after completing the description for the
4 item(s) she wished to sell on eBay, she was prompted to provide a phone number to eBay so
5 that eBay could place an automated phone call to Plaintiff to verify her identity. During that
6 call, a computer would speak a PIN code or password, which the listener would then input
7 online.

8 27. Because Plaintiff cannot hear, she is not able to verify her identity or receive a
9 PIN via telephone. eBay provided Plaintiff with no alternative means of identity verification,
10 despite her requests.

11 28. Plaintiff, with no prompting by eBay to do so, clicked on the “Live Help”
12 feature on the product listing page to inquire via live Internet chat about an alternative to
13 receiving a telephone call for verifying her identity. Plaintiff identified herself as a deaf
14 person. The eBay representative, Shannon C., did not allow Plaintiff to register as an eBay
15 seller.

16 29. On June 23, 2008, Plaintiff wrote to the eBay Trust & Safety team via email
17 to request that the block on her account be removed so that she could complete the
18 registration process and begin selling items on eBay. In her email, Plaintiff identified herself
19 as a deaf person. In response, eBay did not allow Plaintiff to register as an eBay seller.

20 30. On July 7, 2008, Plaintiff again attempted to verify her identity through the
21 “eBay Account Security Live Help!” During the chat session, Plaintiff identified herself as a
22 deaf person. In response, eBay did not allow Plaintiff to register as an eBay seller.

23 31. Plaintiff again unsuccessfully attempted to register to sell items on eBay.com
24 in or about December 2009. This attempt was unsuccessful for the same reason described
25 above: she was required but unable on account of her disability to verify her identity by
26 telephone.

27 32. Plaintiff was never able to register with eBay as a seller and thus prevented
28

1 from using eBay's services solely because of her disability. Plaintiff was never provided any
2 reason other than her disability for being prevented from registering as a seller.

3 33. Plaintiff's interactions with eBay regarding her disability demonstrate the
4 intentional nature of eBay's discrimination toward Plaintiff.

5 34. All of Plaintiff's interactions with eBay took place within the state of
6 California.

7 35. On July 22, 2010, Plaintiff met in person with in-house and outside counsel
8 for eBay in Palo Alto, California to discuss the instant dispute. Despite having verified Ms.
9 Earll's identity in person, eBay still refuses to allow Ms. Earll to register as a seller.

10 36. If eBay's real purpose were to verify identities or prevent fraud, then surely an
11 in-person meeting would suffice. Yet despite Plaintiff having flown to California, met with
12 eBay legal personnel, and verified her identity in person, eBay refuses to allow Plaintiff to
13 register as an eBay seller. Thus, eBay is intentionally discriminating against Plaintiff on
14 account of her being deaf.

15
16 **EBAY'S VERIFICATION SYSTEM IS INTENTIONALLY DISCRIMINATORY**

17 37. eBay has taken affirmative steps to discriminate against deaf and hard of
18 hearing persons by creating a system that they cannot use. The basis of this suit is not that
19 eBay has passively failed to accommodate deaf and hard of hearing persons. Rather, the basis
20 of the suit is that eBay has gone out of its way to design a system that deaf and hard of
21 hearing persons cannot use. In short, eBay intentionally discriminates against deaf and hard
22 of hearing persons.

23 38. By creating a seller registration system that requires hearing ability and that
24 provides no alternative, eBay has erected a barrier to its website that screens out or tends to
25 screen out deaf and hard of hearing persons.

26 39. What makes eBay's discriminatory conduct all the more galling is that
27 solutions to this problem are readily available. eBay simply needs to implement a seller
28

1 registration system that utilizes PINs presented visually and aurally.

2 40. For example, upon information and belief, chase.com, a website for JPMorgan
3 Chase & Co., requires registration and identity verification for use of certain parts of its
4 website. Like eBay, chase.com requires authentication within the website and outside of the
5 website. While eBay's off-website authentication is only phone call-based, chase.com allows
6 users to choose from phone calls, text messages, and emails for off-website authentication.

7 41. In all likelihood, eBay could fix the disability access problems alleged herein
8 by implementing a system similar to that used by chase.com: allow the registering seller to
9 choose whether to receive a phone call, a text message, or an email for off-site identity
10 verification. This method even serves both deaf and visually impaired users. eBay's
11 unwillingness to utilize readily available systems to accommodate deaf and hard of hearing
12 users further demonstrates eBay's discriminatory intent.

13 14 **CLASS ALLEGATIONS**

15 42. Plaintiff Earll brings this action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2),
16 and 23(b)(3) on behalf of herself and a class of similarly situated persons: *all persons who*
17 *are deaf or hard of hearing in the United States who have attempted to register as sellers*
18 *with eBay and as a result have been prevented from doing so because of eBay's telephone*
19 *aural verification system.* Excluded from the Class are Defendant, their legal representatives,
20 assigns, and successors, and any entity in which Defendant has a controlling interest. Also
21 excluded is the judge to whom this case is assigned and the judge's immediate family.

22 43. The Class consists of thousands of individuals and other entities, making
23 joinder impractical.

24 44. The claims of Plaintiff are typical of the claims of all of the other members of
25 the Class.

26 45. Plaintiff will fairly and adequately represent and protect the interests of the
27 other members of the Class. Plaintiff has retained counsel with substantial experience in
28

1 prosecuting complex litigation and class actions. Plaintiff and her counsel are committed to
2 vigorously prosecuting this action on behalf of the members of the Class, and have the
3 financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to
4 those of the other members of the Class.

5 46. Absent a class action, most members of the Class would find the cost of
6 litigating their claims to be prohibitive and will have no effective remedy. The class
7 treatment of common questions of law and fact is also superior to multiple individual actions
8 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
9 promotes consistency and efficiency of adjudication.

10 47. eBay has acted and failed to act on grounds generally applicable to Plaintiff
11 and the other members of the Class, requiring the Court's imposition of uniform relief to
12 ensure compatible standards of conduct toward the members of the Class.

13 48. The factual and legal bases of eBay's liability to Plaintiff and to the other
14 members of the Class are the same, resulting in injury to Plaintiff and all of the other
15 members of the Class. Plaintiff and the other members of the Class have all suffered harm as
16 a result of eBay's wrongful conduct.

17 49. There are many questions of law and fact common to the claims of Plaintiff
18 and the other members of the Class, and those questions predominate over any questions that
19 may affect individual members of the Class. Common questions for the Class include but are
20 not limited to the following: whether eBay's conduct described herein violates the ADA, 42
21 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and 12182(b)(2)A(i)-(iv); whether eBay's conduct
22 described herein violates the DPA, Cal. Civ. Code §§ 54 *et seq.*; and, whether eBay's
23 conduct described herein violates the California Unruh Civil Rights Act, Cal. Civ. Code
24 §§ 51 *et seq.*

FIRST CAUSE OF ACTION

Violation of the ADA, 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) and (b)(2)(A)(i)-(iv)

(on behalf of Plaintiff and the Class)

THIS COUNT HAS BEEN DISMISSED WITH PREJUDICE AND IS INCLUDED

ONLY TO PRESERVE A POTENTIAL APPEAL.

50. Plaintiff incorporates by reference the foregoing allegations.

51. Section 12182(a) of the ADA states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

52. Sections 12181(7)(D) & (E) defines private entities, like eBay, as places of public accommodation to include a “place of public gathering” and “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment” when they affect commerce. Section 12181(7) does not expressly limit places of public accommodation to brick- and-mortar operations, nor does it expressly preclude Internet-based operations.

53. Section 12181(1) defines commerce as “travel, trade, traffic, commerce, transportation, or communication—among the several States; between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country.”

54. eBay describes itself in the following manner:

With more than 94 million active users globally, eBay is the world's largest online marketplace, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. Their collective impact on e-commerce is staggering: In 2010, the total worth of goods sold on eBay was \$62 billion -- more than \$2,000 *every second*.

1 55. As a for-profit entity facilitating \$62 billion in sales of goods annually in and
2 among the several States and internationally, eBay affects commerce, as defined in 42 U.S.C.
3 § 12181(1).

4 56. As “the world’s largest online marketplace, where practically anyone can buy
5 and sell practically anything” and by “connect[ing] a diverse and passionate community,”
6 eBay is a “place of public gathering,” as well as a “shopping center” as defined in 42 U.S.C.
7 §§ 12181(7)(D) & (E).

8 57. eBay lists its categories of items for sale at
9 <http://shop.ebay.com/allcategories/all-categories>. These categories include “Clothing, Shoes
10 & Accessories” and “Tools & Home Improvement,” among dozens of others, which correlate
11 to the “clothing store” and “hardware store” definitions in 42 U.S.C. § 12181(7)(E). And
12 with tens of millions of items for sale at any given moment, eBay is the epitome of a
13 “shopping center, or other sales or rental establishment,” as defined in § 12181(7)(E).

14 58. Accordingly, eBay is a “place of public accommodation,” as defined in 42
15 U.S.C. §§ 12181(7) & 12182(a).

16 59. Sections 12182(b)(1)(A)(i)-(iii) state in relevant part that it shall be
17 discriminatory to deny participation to, require participation of an unequal benefit, or provide
18 a separate benefit to an individual or a class of individuals on the basis of a disability or
19 disabilities.

20 60. Section 12182(b)(2)(A)(i) states that discrimination includes “the imposition
21 or application of eligibility criteria that screen out or tend to screen out an individual with a
22 disability from fully and equally enjoying the goods, services, facilities, privileges,
23 advantages, or accommodations unless necessary for the provision” thereof.

24 61. eBay violates this section by imposing upon would-be eBay sellers a
25 registration process that screens out deaf and hard of hearing persons.

26 62. Section 12182(b)(2)(A)(ii) states that discrimination includes “a failure to
27 make reasonable modifications in policies, practices, or procedures, when such modifications
28

1 are necessary to afford such goods, services, facilities, privileges, advantages, or
2 accommodations to individuals with disabilities . . . ”

3 63. eBay violates this section by failing to make reasonable accommodations to
4 its registration process necessary to afford deaf and hard of hearing persons access to eBay’s
5 services, facilities, privileges, advantages, and accommodations.

6 64. Section 12182(b)(2)(A)(iii) states that discrimination includes “a failure to
7 take such steps as may be necessary to ensure that no individual with a disability is excluded,
8 denied services, segregated or otherwise treated differently than other individuals because of
9 the absence of auxiliary aids and services . . . ”

10 65. eBay violates this section by failing to take the necessary steps to ensure that
11 deaf and hard of hearing persons are not excluded, denied services, segregated, or treated
12 differently during the seller registration process.

13 66. Section 12182(b)(2)(A)(iv) states that discrimination includes “a failure to
14 remove . . . communication barriers . . . where such removal is readily achievable.”

15 67. eBay violates this section by failing to remove communication
16 barriers—namely the aural verification system—from the seller registration process despite
17 the availability of readily achievable alternatives.

18 68. As alleged herein, eBay facilitates offline shopping as well as the online
19 shopping for which it is so well known. At eBay.com, offline and online shopping are
20 inextricably linked. Thus, eBay prevents Plaintiff on account of her being deaf from selling
21 both online and offline/locally via eBay.com. In other words, eBay’s discriminatory conduct
22 limits Plaintiff’s access to both online places of public accommodation and places of public
23 accommodation in the physical world.

1 **SECOND CAUSE OF ACTION**

2 **Violation of the California Disabled Persons Act, Cal. Civ. Code §§ 54, *et seq.***

3 **(on behalf of Plaintiff and the Class)**

4 ***THIS COUNT HAS BEEN DISMISSED WITH PREJUDICE AND IS INCLUDED***
 5 ***ONLY TO PRESERVE A POTENTIAL APPEAL.***

6 69. Plaintiff incorporates by reference the foregoing allegations.

7 70. The Disabled Persons Act (“DPA”) states that “[i]ndividuals with disabilities
 8 shall be entitled to full and equal access, as other members of the general public, to
 9 accommodations, advantages, facilities, medical facilities, including . . . places to which the
 10 general public is invited, subject only to the conditions and limitations established by law, or
 11 state or federal regulation, and applicable alike to all persons.” Cal. Civ. Code § 54.1(a)(1).

12 71. Section 54.1(a)(3) states that “‘full and equal access,’ for purposes of this
 13 section in its application to transportation, means access that meets the standards of Titles II
 14 and III of the Americans with Disabilities Act of 1990 and federal regulations adopted
 15 pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean
 16 access that meets those higher standards.” (Citations omitted.)

17 72. The DPA does not otherwise define “full and equal access” for applications
 18 other than transportation.

19 73. Regardless, “the laws of this state prescribe higher standards” than the ADA
 20 because the DPA and the Unruh Act both have been interpreted to apply to websites even
 21 absent a nexus to physical locations, while the ADA has been interpreted by some courts to
 22 require a nexus between websites and physical locations.

23 74. Section 54.1(a)(3) does not state that higher standards than the ADA apply
 24 only if prescribed by state laws *other* than the DPA. In other words, the DPA itself may
 25 prescribe higher standards that eBay must meet.

26 75. The DPA and the Unruh Act are the two exclusive state laws regulating
 27 disability access for private entities applicable to this case. Thus, there are no other statutes
 28

1 or regulations on which the DPA may rely in this case.

2 76. Both the DPA and the Unruh Act require disability access for websites to
3 which the general public is invited.

4 77. The “general public is invited” to sell on eBay.com. As eBay itself states,
5 eBay.com is the place “where practically anyone can buy and sell practically anything.”
6 eBay.com thus constitutes a “public place” within the meaning of the DPA. Thus, the DPA
7 and the Unruh Act require that eBay.com be accessible to deaf and hard of hearing persons.

8 78. Deafness and hardness of hearing are disabilities as defined in Cal. Govt.
9 Code § 12926.

10 79. By denying access to eBay’s selling services to deaf and hard of hearing
11 persons, eBay, as a California business, is denying Plaintiff and Class members full and
12 equal access to the accommodations, advantages, and facilities of eBay.com in violation of
13 the DPA.

14 80. Additionally, Section 54(c) states that “[a] violation of the right of an
15 individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also
16 constitutes a violation of this section.”

17 81. As alleged above, eBay is violating the ADA; thus, it is—for this separate and
18 independent reason from those articulated above—also violating the DPA. For the sake of
19 clarity, Plaintiff alleges both ADA-independent and ADA-dependent violations of the DPA.

20 82. Plaintiff and Class members are entitled to injunctive relief to remedy the
21 discrimination.

22 83. Section 54.3 explicitly states that “*any* person denied any of the rights
23 provided in Sections 54, 54.1, and 54.2” (emphasis added) may bring suit.

24 84. Under § 54.3, Plaintiff and Class members are entitled to actual damages,
25 treble damages, and statutory damages for each offense, plus attorneys’ fees.

THIRD CAUSE OF ACTION

Violation of the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51, *et seq.*

(on behalf of Plaintiff and the Class)

85. Plaintiff incorporates by reference the foregoing allegations.

86. Cal. Civ. Code § 51(b) states:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

87. Cal. Civ. Code § 51.5(a) states:

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

88. Cal. Civ. Code § 51.5(b) defines “person” to include “any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.

89. Deafness and hardness of hearing are disabilities as defined in Cal. Govt. Code §§ 12926 and 12926.1.

90. By denying access to eBay’s selling services to deaf and hard of hearing persons, eBay is denying Plaintiff and Class members full and equal access to the accommodations, advantages, and facilities, privileges, or services of eBay.com in violation of § 51.

91. By discriminating against Plaintiff on account of her disability, eBay is violating § 51.5.

1 92. eBay is a “business establishment” within the meaning of § 51. Selling
2 services on eBay.com are inaccessible to deaf and hard of hearing patrons. This
3 inaccessibility denies deaf and hard of hearing patrons full and equal access to the facilities,
4 goods, and services that eBay makes available to the non-disabled public. eBay is violating
5 the Unruh Act in that eBay is denying deaf and hard of hearing customers the ability to sell
6 on eBay.com. Upon information and belief, these violations are ongoing.

7 93. eBay’s actions constitute intentional discrimination against the class on the
8 basis of a disability in violation of the Unruh Act in that: eBay claims that the reason it
9 requires Plaintiff to use a telephone to register as an eBay seller is to verify her identity. But
10 eBay’s conduct demonstrates that this reason is a mere pretext. eBay has constructed and
11 maintained a website that is inaccessible to Plaintiff, and failed to correct these barriers even
12 after being notified of the discrimination that such barriers cause. Additionally, eBay’s in-
13 house and outside legal counsel have verified Plaintiff’s identity in person, yet eBay still
14 refuses to allow Plaintiff to register as an eBay seller. The only plausible conclusion is that
15 eBay is intentionally discriminating against Plaintiff on account of her disability.

16 94. Alternatively, eBay discriminatorily applies its policies to Plaintiff because of
17 her disability. eBay is applying its policy to Plaintiff in such a manner so as to prevent her
18 from becoming an eBay seller despite having verified her identity in person. By verifying her
19 identity in person, eBay has neutralized the purported threat of fraud that Plaintiff may pose.
20 Still, eBay refuses to allow Plaintiff to register as an eBay seller. Thus, eBay is no longer
21 applying its policies to achieve its stated purpose of preventing fraud, but instead to
22 discriminate against Plaintiff.

23 95. In order for eBay to make money, it needs sellers. Here, Plaintiff has
24 attempted many times to register as a seller. Yet Plaintiff—even after verifying her identity
25 in person with eBay—is still not a registered eBay seller. This is antithetical to eBay’s
26 business model. It is simply irrational from a business and economic perspective to deny
27 Plaintiff the opportunity to sell on eBay. If eBay treated all users this way, then eBay could
28

1 not make any money. Thus, it is a plausible inference, at minimum, that eBay's reason for
2 denying Plaintiff the opportunity to sell on eBay is based on a discriminatory intent or
3 discriminatory application of eBay's policies.

4 96. eBay's conduct is only rational if its intent is discriminatory. eBay's conduct
5 makes no sense otherwise.

6 97. Additionally, § 51(f) states that "[a] violation of the right of any individual
7 under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute
8 a violation of this section.

9 98. As alleged above, eBay is violating the ADA; thus, it is—for this separate and
10 independent reason from those articulated above—also violating § 51. For the sake of clarity,
11 Plaintiff alleges both ADA-independent and ADA-dependent violations of the Unruh Act.

12 99. Section 52 explicitly states that "*any* person denied the rights provided in
13 Section 51, 51.5, or 51.6" (emphasis added) may bring suit.

14 100. Under § 52(a), Plaintiff and Class members are entitled to actual damages
15 (both special and general damages), treble damages, and statutory damages for each and
16 every offense, plus attorneys' fees.

17 18 PRAYER FOR RELIEF

19 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following
20 relief:

- 21 A. A preliminary and permanent injunction prohibiting eBay from violating the
22 ADA;
- 23 B. A preliminary and permanent injunction prohibiting eBay from violating the
24 DPA;
- 25 C. A preliminary and permanent injunction prohibiting eBay from violating the
26 Unruh Civil Rights Act;
- 27 D. A preliminary and permanent injunction requiring eBay to make the seller
28

1 registration process readily accessible to and usable by deaf and hard of
2 hearing persons;

3 E. Declare that eBay created its seller registration process in a manner that
4 discriminates against deaf and hard of hearing persons and fails to provide
5 access for persons disabilities, as required by law;

6 F. An order certifying this case as a class action on behalf of the Class defined
7 above; appointing Melissa J. Earll as class representative; and appointing her
8 counsel as class counsel;

9 G. Award of the maximum actual damages allowed by law;

10 H. Award of the maximum treble damages allowed by law;

11 I. Award of the maximum statutory damages allowed by law;

12 J. Award Plaintiff and the Class their reasonable litigation expenses and
13 attorneys' fees;

14 K. Award Plaintiff and the Class pre- and post-judgment interest, to the extent
15 allowable;

16 L. Enter injunctive and/or declaratory relief as necessary to protect the interests
17 of Plaintiff and the Class; and,

18 M. Award such other and further relief as equity and justice may require.
19

20 JURY TRIAL

21 101. Plaintiff demands a trial by jury for all issues so triable.
22

23 Dated: September 6, 2012

Respectfully submitted,

24 s/ Michael Aschenbrener
25 Michael Aschenbrener
26 ASCHENBRENER LAW, P.C.
27
28

CERTIFICATE OF SERVICE

The undersigned certifies that, on September 6, 2012, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: September 6, 2012

ASCHENBRENER LAW, P.C.

By: s/ Michael Aschenbrener

Michael Aschenbrener

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MELISSA J. EARLL,
Plaintiff,

v.

EBAY INC.,

Defendant.

Case No.: 5:11-CV-00262-EJD

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

[Re: Docket No. 80]

Presently before the court is Defendant eBay Inc.'s ("Defendant") Motion to Dismiss and Strike Plaintiff Melissa J. Earl's ("Plaintiff") Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f). The court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing. The court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and personal jurisdiction and venue are proper because Defendant is a corporation headquartered in Santa Clara County. Having fully reviewed the parties' briefing, the court GRANTS Defendant's Motion to Dismiss. Because the court grants dismissal with prejudice, Defendant's Motion to Strike is moot.

I. BACKGROUND

The background of this case was thoroughly presented in this court's Order granting Defendant's Motion to Dismiss First Amended Complaint, and is repeated only to the extent it is applicable to the present motion. See Dkt. No. 76. Plaintiff, a Missouri resident who is deaf, filed this putative class action on March 16, 2010 in the Western District of Missouri alleging violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA") and the California Disabled Persons Act, Cal. Civ. Code §§ 54 et seq. ("DPA"). See Dkt. No. 1. Plaintiff based these claims on assertions that she, as a deaf individual, was unable to register as an eBay seller because Defendant failed to provide her with an accommodation to its telephonic identity verification policy.

The case was transferred to this district in January 2011 and assigned to Judge Jeremy Fogel. See Dkt. Nos. 30, 34. After transfer, Plaintiff moved for leave to file an amended complaint. Dkt. No. 47. The proposed amended complaint maintained Plaintiff's original claims and added a claim under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51, et seq. ("Unruh Act"). Judge Fogel denied Plaintiff's motion for leave to amend without prejudice, finding that (1) the ADA could not afford a remedy to Plaintiff because eBay.com is not a place of public accommodation, but (2) Plaintiff may be able to state an independent claim under the Unruh Act if she sufficiently pleaded intentional discrimination, and (3) Plaintiff may be able to state independent claims under the DPA if she alleged a violation of a California law that requires higher standards of website accessibility than the ADA. Dkt. No. 61 at 3:18-5:22. Judge Fogel granted Plaintiff leave to file an amended complaint consistent with his Order. Id.

This case was transferred from Judge Fogel to this court on September 27, 2011. See Dkt. No. 62. On October 5, 2011, Plaintiff filed her FAC alleging violations of the ADA, the DPA, and the Unruh Act. Dkt. No. 63. Defendant moved to dismiss Plaintiff's FAC on October 19, 2011. Dkt. No. 66. This court granted Defendant's motion, dismissing all of Plaintiff's claims. Dkt. No. 76. The ADA and DPA claims were dismissed with prejudice because Plaintiff's complaint exceeded the scope of Judge Fogel's Order with respect to these claims. In regards to the Unruh

1 Act claim, this court found that “[Plaintiff’s] allegations describe a facially neutral verification
2 process with a disparate impact on the deaf community, but they do not demonstrate intentional
3 discrimination. Furthermore, the fact that [Plaintiff] contacted eBay’s customer service and
4 unsuccessfully requested to have eBay’s otherwise applicable procedures modified is not sufficient
5 to state a plausible claim of intentional discrimination.” Having highlighted the flaws in Plaintiff’s
6 Unruh Act claim, this court dismissed it with leave to amend.

7 Plaintiff filed her SAC on September 6, 2012, leaving her ADA and DPA claims “to
8 preserve a potential appeal,” and modifying her Unruh Act claim. Dkt. No. 77. Defendant filed its
9 Motion to Dismiss the SAC on September 20, 2012. Dkt. No. 80. The court now turns to this
10 motion.

11 II. LEGAL STANDARD

12 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim in the
13 complaint with sufficient specificity to “give the defendant fair notice of what the ... claim is and
14 the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)
15 (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be
16 dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).
17 Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is “proper only
18 where there is no cognizable legal theory or an absence of sufficient facts alleged to support a
19 cognizable legal theory.” Shroyer v. New Cingular Wireless Servs., Inc., 606 F.3d 658, 664 (9th
20 Cir. 2010) (quoting Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)). In considering whether
21 the complaint is sufficient to state a claim, the court must accept as true all of the factual
22 allegations contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While a
23 complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,
24 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Twombly, 550
25 U.S. at 570).

III. DISCUSSION

Because the court previously dismissed Plaintiff's ADA and DPA claims with prejudice, the Unruh Act claim is the only remaining cause of action susceptible to dismissal. The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their ... disability ... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). To maintain an Unruh Act claim independent of an ADA claim, Plaintiff must allege "intentional discrimination in public accommodations in violation of terms of the Act." Munson v. Del Taco, Inc., 46 Cal.4th 661, 668 (2009) (quoting Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1175 (1991)). To state a claim for intentional discrimination Plaintiff must allege "willful, affirmative misconduct," which constitutes more than a disparate impact of a facially neutral policy on a particular group. Koebke v. Bernardo Heights Country Club, 36 Cal.4th 824, 854 (2005).

In her SAC, Plaintiff removes certain allegations contained in her FAC that this court found offset her intentional discrimination claim. In their place Plaintiff includes new allegations regarding an in-person meeting she had with eBay's counsel after the filing of this lawsuit. Particularly, Plaintiff now alleges that after that meeting, in which surely her identity was verified, Defendant "still refuses to allow Plaintiff to register as an eBay seller." Dkt. No. 77 ¶ 93. The only "plausible conclusion," according to Plaintiff, is that Defendant "is intentionally discriminating against Plaintiff on account of her disability." Id. Alternatively, Plaintiff suggests that Defendant is "no longer applying its policies to achieve its stated purpose of preventing fraud"—because Defendant has now verified Plaintiff's identity in person, nullifying the possibility of fraud—but rather is applying its policies "to discriminate against Plaintiff." Id.

Defendant contends that Plaintiff's SAC fails to state a claim for intentional discrimination under the Unruh Act because Plaintiff's allegations still only describe a facially neutral policy that has a disparate impact on her. Taking the SAC on its face, this court agrees. That Defendant has failed to register Plaintiff as a seller even after meeting her is not, without more, sufficient to

1 constitute the “willful, affirmative misconduct” required to state a claim of intentional
2 discrimination under the Unruh Act.

3 In dismissing Plaintiff’s Unruh Act claim in her FAC, this court noted that Plaintiff’s
4 complaint lacked facts supporting her potential theories of intentional discrimination. Plaintiff has
5 failed to remedy this deficiency in her SAC. The absence of supporting factual allegations is fatal
6 to Plaintiff’s claim. Particularly, Plaintiff has not alleged that she affirmatively sought to register
7 as a seller after this meeting, nor has she included any allegations that Defendant specifically
8 denied any renewed request she may have made. More importantly, Plaintiff has failed to include
9 any allegations suggesting that Defendant’s refusal or failure to register her as a seller after their
10 meeting was related to her disability. While Plaintiff alleges that her disability is the “only
11 plausible explanation,” the court simply is not persuaded by this conclusory contention. See
12 Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996) (“[C]onclusory allegations of law
13 and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a
14 claim.”); accord Iqbal, 555 U.S. at 677–80. In fact, any number of factors could have contributed
15 to Defendant’s failure to register Plaintiff as a seller.

16 Plaintiff cannot satisfy Rule 8’s requirements by simply alleging that (1) she is deaf, (2) she
17 notified Defendant that its seller verification procedure discriminated against deaf persons, (3)
18 Defendant had the opportunity to verify her identity, but (4) Defendant nevertheless failed to
19 register her as a seller. Rather, she must include some allegation firmly connecting her disability to
20 Defendant’s refusal to register her as a seller. In a similar case in this district, Young v. Facebook,
21 Inc., a plaintiff suffering from bipolar disorder claimed that Facebook had intentionally
22 discriminated against her by terminating her account and addressing her concerns with automated
23 responses instead of with real human interaction, which would have been capable of assisting
24 persons with mental disabilities. Young v. Facebook, Inc., 790 F.Supp.2d 1110, 1116 (N.D. Cal.
25 2011). The court in that case dismissed the plaintiff’s Unruh Act claim, explaining that despite her
26 vivid description of the difficulty she encountered with Facebook’s customer service system as a
27 result of her disability, she had not alleged that Facebook had treated her differently because of her
28

1 disability. Likewise here, without an allegation tying Defendant's failure to register Plaintiff as a
2 seller to her hearing impairment, Plaintiff has failed to allege that eBay intentionally treated her
3 differently because of her disability and her claim thus must be dismissed.

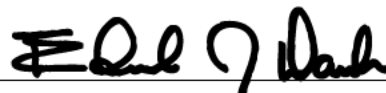
4 Plaintiff has now attempted to plead this claim three times and has received guidance from
5 both Judge Fogel and this court as to the deficiencies in her claim as pleaded. Because Plaintiff has
6 still failed to allege the necessary intentional discrimination the court finds any further attempts to
7 amend would be futile. See Duma v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996) (affirming district
8 court's dismissal without leave to amend because Plaintiff had filed four complaints "and yet
9 continued to allege insufficient facts"). Therefore, Plaintiff's Unruh Act claim will be dismissed
10 with prejudice.

11 IV. CONCLUSION

12 For the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss Second
13 Amended Complaint with prejudice. Because the remaining causes of action in Plaintiff's
14 complaint have already been dismissed with prejudice, the complaint is dismissed in its entirety.
15 Defendant's Motion to Strike is therefore moot. Judgment will be entered in favor of Defendant.
16 The clerk of the court shall close this file.

17 **IT IS SO ORDERED**

18 Dated: December 20, 2012



EDWARD J. DAVILA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MELISSA J. EARLL,

CASE NO. 5:11-CV-00262-EJD

JUDGMENT

Plaintiff,

v.

EBAY INC.,


Defendant.

Defendant's Motion to Dismiss having been granted (see Docket Item No. 86), and Plaintiff's causes of action having been dismissed without leave to amend, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Defendant.

The clerk shall close this file.

IT IS SO ORDERED.

Dated: December 20, 2012


EDWARD J. DAVILA
United States District Judge

CLEAR FORM

Name Michael Aschenbrener
 Address 795 Folsom St, First Floor
 City, State, Zip San Francisco, CA 94107
 Phone 415-813-6245
 Fax 415-813-6246
 E-Mail mja@aschenbrenerlaw.com
☐ FPD ☐ Appointed ☐ CJA ☐ Pro Per ☒ Retained

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

Melissa J. Earll, individually and on behalf of all others
 similarly situated,

PLAINTIFF(S),

v.

eBay Inc., a Delaware Corporation,

DEFENDANT(S).

CASE NUMBER:

5:11-cv-262-EJD

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff Melissa J. Earll hereby appeals to
Name of Appellant
 the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

- ☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

- ☒ Order (specify):
 Denying Motion for Leave to File Amended Complaint;
 Granting Motion to Dismiss First Amended Complaint; and,
☒ Judgment (specify):
 Judgment in favor of Defendant
☐ Other (specify):

Imposed or Filed on 9/7/11, 8/8/12, 12/20/12. Entered on the docket in this action on Dkt. Nos. 61, 76, 86, & 87.

A copy of said judgment or order is attached hereto.

January 18, 2013
 Date

s/ Michael Aschenbrener
 Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

**U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:11-cv-00262-EJD**

Earll v. eBay, Inc., a Delaware Corporation
Assigned to: Hon. Edward J. Davila
Referred to: Magistrate Judge Howard R. Lloyd
Case in other court: Ninth Circuit Court Appeals, 13-15134
Missouri Western, 3:10-cv-03089
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 01/19/2011
Date Terminated: 12/20/2012
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Diversity

Plaintiff

Melissa J Earll

represented by **Christopher L. Dore**
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ATTORNEY TO BE NOTICED

V.

Defendant

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a Delaware Corporation

represented by **David M. Eisenberg**

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Email: wlazerson@sidley.com
ATTORNEY TO BE NOTICED

| Date Filed | # | Docket Text |
|------------|-----------|--|
| 03/16/2010 | <u>1</u> | COMPLAINT against eBay, Inc., a Delaware Corporation filed by Williams G. Crowe on behalf of Melissa J Earll. Filing fee \$350, receipt number 0866-2314679. Service due by 7/19/2010. (Attachments: # <u>1</u> Civil Cover Sheet)(Crowe, Williams) (Entered: 03/16/2010) |
| 03/16/2010 | | SUMMONS ISSUED as to eBay, Inc., a Delaware Corporation. Summons returned via electronic e-mail to counsel for Plaintiff for service. (Burch, C. Steve) (Entered: 03/16/2010) |
| 03/16/2010 | <u>2</u> | LETTER OF REASSIGNMENT from Magistrate Judge James C. England to District Judge Richard E. Dorr. (Burch, C. Steve) (Entered: 03/16/2010) |
| 03/16/2010 | <u>3</u> | Notice of EAP assignment to an outside mediator. (Attachments: # <u>1</u> EAP General Order)(Burch, C. Steve) (Entered: 03/16/2010) |
| 03/17/2010 | <u>4</u> | Motion to allow Jay Edelson to appear pro hac vice (Pro Hac fee \$50 receipt number 0866-2316065) filed by Williams G. Crowe on behalf of Melissa J Earll. (Crowe, Williams) (Entered: 03/17/2010) |
| 03/17/2010 | <u>5</u> | Motion to allow Michael Aschenbrener to appear pro hac vice (Pro Hac fee \$50 receipt number 0866-2316065) filed by Williams G. Crowe on behalf of Melissa J Earll. (Crowe, Williams) (Entered: 03/17/2010) |
| 03/17/2010 | <u>6</u> | Motion to allow Christopher Dore to appear pro hac vice (Pro Hac fee \$50 receipt number 0866-2316065) filed by Williams G. Crowe on behalf of Melissa J Earll. (Crowe, Williams) (Entered: 03/17/2010) |
| 03/18/2010 | <u>7</u> | ORDER granting <u>4</u> <u>5</u> <u>6</u> motions to appear pro hac vice approved by Clerk of Court. Attorneys Jay Edelson, Michael J Aschenbrener, Christopher L Dore for Melissa J Earll allowed to appear pro hac vice. This entry will serve as authorization for the pro hac participation by the attorneys. Signed on 3/18/2009. This is a TEXT ONLY ENTRY. No document is attached. (Brogan, Shannon) (Entered: 03/18/2010) |
| 03/18/2010 | <u>8</u> | ADMINISTRATIVE ORDER TRANSFERRING/REASSIGNING CASE to the Southwestern Division. Signed on 3/18/2010 by Shannon Y. Brogan. (Brogan, Shannon) (Entered: 03/18/2010) |
| 07/19/2010 | <u>9</u> | MOTION for extension of time to file answer <i>Stipulation Extending Time to Respond to Complaint</i> filed by David M. Eisenberg on behalf of eBay, Inc.. Suggestions in opposition/response due by 8/5/2010 unless otherwise directed by the court. (Eisenberg, David) (Entered: 07/19/2010) |
| 07/22/2010 | <u>10</u> | ORDER granting <u>9</u> Motion for Extension of Time to Answer. eBay, Inc. answer due 8/20/2010. Signed on 7/22/10 by District Judge Richard E. Dorr. (Siegert, Karen) (Entered: 07/22/2010) |
| 08/11/2010 | <u>11</u> | Motion to allow Wendy Lazerson to appear pro hac vice (Pro Hac fee \$50 receipt number 0866-2445918) filed by David M. Eisenberg on behalf of eBay, Inc.. (Eisenberg, David) (Entered: 08/11/2010) |
| 08/12/2010 | <u>12</u> | ORDER granting <u>11</u> motion to appear pro hac vice approved by Clerk of Court. Attorney Wendy M. Lazerson for eBay, Inc. allowed to appear pro hac vice. This entry will serve as authorization for the pro hac participation by the attorney. This is a TEXT ONLY ENTRY. No document is attached. (Burch, C. Steve) (Entered: 08/12/2010) |
| 08/20/2010 | <u>13</u> | DISCLOSURE OF CORPORATE INTERESTS filed by David M. Eisenberg on behalf of Defendant eBay, Inc..(Eisenberg, David) (Entered: 08/20/2010) |
| 08/20/2010 | <u>14</u> | MOTION to dismiss case <i>or alternatively to transfer venue</i> filed by David M. Eisenberg on behalf of eBay, Inc.. Suggestions in opposition/response due by 9/7/2010 unless otherwise directed by the court. (Eisenberg, David) (Entered: 08/20/2010) |
| 08/20/2010 | <u>15</u> | SUGGESTIONS in support re <u>14</u> MOTION to dismiss case <i>or alternatively to transfer venue</i> filed by David M. Eisenberg on behalf of Defendant eBay, Inc.. (Attachments: # <u>1</u> Affidavit Ambruster Declaration, # <u>2</u> Exhibit A (Ambruster |

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| | | Dec), # <u>3</u> Exhibit B (Armbruster Dec), # <u>4</u> Affidavit Lazerson Declaration, # <u>5</u> Exhibit A (Lazerson Dec), # <u>6</u> Exhibit B (Lazerson Dec), # <u>7</u> Appendix Proposed Order)(Related document(s) <u>14</u>) (Eisenberg, David) (Entered: 08/20/2010) |
| 08/20/2010 | <u>16</u> | MOTION to dismiss case <i>pursuant to Rule 12(b)(6)</i> filed by David M. Eisenberg on behalf of eBay, Inc.. Suggestions in opposition/response due by 9/7/2010 unless otherwise directed by the court. (Eisenberg, David) (Entered: 08/20/2010) |
| 08/20/2010 | <u>17</u> | SUGGESTIONS in support re <u>16</u> MOTION to dismiss case <i>pursuant to Rule 12(b)(6)</i> filed by David M. Eisenberg on behalf of Defendant eBay, Inc.. (Attachments: # <u>1</u> Appendix Proposed Order)(Related document(s) <u>16</u>) (Eisenberg, David) (Entered: 08/20/2010) |
| 09/03/2010 | <u>18</u> | DESIGNATION OF NEUTRAL naming Eric Green of Resolutions, LLC(Aschenbrener, Michael) (Entered: 09/03/2010) |
| 09/07/2010 | <u>19</u> | SUGGESTIONS in opposition re <u>16</u> MOTION to dismiss case <i>pursuant to Rule 12(b)(6)</i> filed by Michael J Aschenbrener on behalf of Plaintiff Melissa J Earll. Reply suggestions due by 9/24/2010 unless otherwise directed by the court (Attachments: # <u>1</u> Proposed Order)(Related document(s) <u>16</u>) (Aschenbrener, Michael) (Entered: 09/07/2010) |
| 09/07/2010 | <u>20</u> | SUGGESTIONS in opposition re <u>14</u> MOTION to dismiss case <i>or alternatively to transfer venue</i> filed by Michael J Aschenbrener on behalf of Plaintiff Melissa J Earll. Reply suggestions due by 9/24/2010 unless otherwise directed by the court (Attachments: # <u>1</u> Proposed Order, # <u>2</u> Exhibit Ex. 1 – Declaration, # <u>3</u> Exhibit Ex. 1–A, # <u>4</u> Ex. 1–B)(Related document(s) <u>14</u>) (Aschenbrener, Michael) (Entered: 09/07/2010) |
| 09/20/2010 | <u>21</u> | NOTICE OF PRETRIAL PROCEDURES, proposed scheduling order ddl 10/28/2010; Rule 26(f) conference ddl 10/08/2010. (Schroeppel, Kerry) (Entered: 09/20/2010) |
| 09/24/2010 | <u>22</u> | REPLY SUGGESTIONS to motion re <u>14</u> MOTION to dismiss case <i>or alternatively to transfer venue</i> filed by David M. Eisenberg on behalf of Defendant eBay, Inc.. (Attachments: # <u>1</u> Appendix Declaration of Ryan D. Marsh)(Related document(s) <u>14</u>) (Eisenberg, David) (Entered: 09/24/2010) |
| 09/24/2010 | <u>23</u> | REPLY SUGGESTIONS to motion re <u>16</u> MOTION to dismiss case <i>pursuant to Rule 12(b)(6)</i> filed by David M. Eisenberg on behalf of Defendant eBay, Inc.. (Related document(s) <u>16</u>) (Eisenberg, David) (Entered: 09/24/2010) |
| 10/05/2010 | <u>24</u> | DISCLOSURE OF CORPORATE INTERESTS <i>Defendant eBay Inc.'s Certificate Of Interest (Local Rule 3.1)</i> filed by David M. Eisenberg on behalf of Defendant eBay, Inc..(Eisenberg, David) (Entered: 10/05/2010) |
| 10/22/2010 | <u>25</u> | CERTIFICATE OF SERVICE OF INITIAL RULE 26 DISCLOSURES filed by David M. Eisenberg on behalf of Defendant eBay, Inc..(Eisenberg, David) (Entered: 10/22/2010) |
| 10/25/2010 | <u>26</u> | Amended CERTIFICATE OF SERVICE OF INITIAL RULE 26 DISCLOSURES filed by David M. Eisenberg on behalf of Defendant eBay, Inc..(Eisenberg, David) (Entered: 10/25/2010) |
| 10/28/2010 | <u>27</u> | PROPOSED SCHEDULING ORDER (<i>Joint</i>) by Melissa J Earll. (Aschenbrener, Michael) (Entered: 10/28/2010) |
| 01/04/2011 | <u>28</u> | ORDER granting <u>14</u> <i>Motion to Dismiss or to Transfer Venue</i> ; case transferred to United States District Court for the Northern District of California; denying as moot <u>16</u> <i>Motion to Dismiss Case</i> . (Schroeppel, Kerry) (Entered: 01/04/2011) |
| 01/05/2011 | <u>29</u> | LETTER from Clerk's Office to counsel. (Siegert, Karen) (Entered: 01/05/2011) |
| 01/19/2011 | <u>30</u> | CASE TRANSFERRED in from United States District Court for the Western District of Missouri, Southwestern Division; Case Number 3:10-cv-03089-RED. Original File Certified Copy of Transfer Order & Docket Sheet Received. (Entered: 01/21/2011) |

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| 01/19/2011 | <u>31</u> | ADR SCHEDULING ORDER: Joint Case Management Statement due 4/26/2011 & Initial Case Management Conference set for 5/3/2011 at 10:00 AM.. (tn, COURT STAFF) (Filed on 1/19/2011) (Entered: 01/21/2011) |
| 01/19/2011 | | CASE DESIGNATED for Electronic Filing. (tn, COURT STAFF) (Entered: 01/21/2011) |
| 01/25/2011 | <u>32</u> | Declination to Proceed Before a U.S. Magistrate Judge by eBay, Inc. <i>Declination to Proceed before a Magistrate Judge and Request for Reassignment to a United States District Judge.</i> (Lazerson, Wendy) (Filed on 1/25/2011) (Entered: 01/25/2011) |
| 01/25/2011 | <u>33</u> | CLERK'S NOTICE of Impending Reassignment to U.S. District Judge. (lmh, COURT STAFF) (Filed on 1/25/2011) (Entered: 01/25/2011) |
| 01/26/2011 | <u>34</u> | ORDER REASSIGNING CASE. Case reassigned to Judge Hon. Jeremy Fogel for all further proceedings. Magistrate Judge Elizabeth D. Laporte no longer assigned to the case. Signed by Executive Committee on 1/26/11. (mab, COURT STAFF) (Filed on 1/26/2011) (Entered: 01/26/2011) |
| 01/28/2011 | <u>35</u> | NOTICE of Appearance by Sean Patrick Reis for Melissa J Earll (gm, COURT STAFF) (Filed on 1/28/2011) (Entered: 01/31/2011) |
| 01/31/2011 | <u>36</u> | NOTICE of Appearance by Wendy M. Lazerson <i>Notice of Appearance of Mary T. Huser</i> (Lazerson, Wendy) (Filed on 1/31/2011) (Entered: 01/31/2011) |
| 01/31/2011 | <u>37</u> | NOTICE of Appearance by Wendy M. Lazerson <i>Notice of Appearance of Margaret A. DeGooyer</i> (Lazerson, Wendy) (Filed on 1/31/2011) (Entered: 01/31/2011) |
| 02/01/2011 | | Case Assigned to Magistrate Judge Howard R. Lloyd for all discovery matters. (tsh, COURT STAFF) (Filed on 2/1/2011) (Entered: 02/01/2011) |
| 02/10/2011 | <u>38</u> | MOTION for Attorney Christopher L. Dore for leave to appear in Pro Hac Vice (Filing fee \$ 275.00, receipt number 34611056168.) filed by Melissa J Earll. (gm, COURT STAFF) (Filed on 2/10/2011) (Entered: 02/14/2011) |
| 02/10/2011 | <u>39</u> | Proposed Order re <u>38</u> MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 275.00, receipt number 34611056168.) by Melissa J Earll. (gm, COURT STAFF) (Filed on 2/10/2011) (Entered: 02/14/2011) |
| 02/10/2011 | <u>40</u> | MOTION for Attorney Michael Aschenbrener for leave to appear in Pro Hac Vice (Filing fee \$ 275.00, receipt number 34611056169.) filed by Melissa J Earll. (gm, COURT STAFF) (Filed on 2/10/2011) (Entered: 02/14/2011) |
| 02/10/2011 | <u>41</u> | Proposed Order re <u>40</u> MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 275.00, receipt number 34611056169.) by Melissa J Earll. (gm, COURT STAFF) (Filed on 2/10/2011) (Entered: 02/14/2011) |
| 02/15/2011 | <u>42</u> | CLERKS NOTICE Case Management Conference set for 5/13/2011 09:00 AM, to be heard with the motion, in Courtroom 3, 5th Floor, San Jose. (dlm, COURT STAFF) (Filed on 2/15/2011) (Entered: 02/15/2011) |
| 02/28/2011 | <u>43</u> | ORDER by Judge Jeremy Fogel granting <u>38</u> Motion for Pro Hac Vice for Christopher L. Dore (dlm, COURT STAFF) (Filed on 2/28/2011) (Entered: 02/28/2011) |
| 02/28/2011 | <u>44</u> | ORDER by Judge Jeremy Fogel granting <u>40</u> Motion for Pro Hac Vice for Michael Aschenbrener (dlm, COURT STAFF) (Filed on 2/28/2011) (Entered: 02/28/2011) |
| 04/08/2011 | <u>45</u> | MOTION to Dismiss <i>Pursuant to Fed. R. Civ. P. 12(b)(6)</i> filed by eBay, Inc.. Motion Hearing set for 5/13/2011 09:00 AM in Courtroom 3, 5th Floor, San Jose before Hon. Jeremy Fogel. (Attachments: # <u>1</u> Proposed Order)(Huser, Mary) (Filed on 4/8/2011) (Entered: 04/08/2011) |
| 04/08/2011 | <u>46</u> | Certificate of Interested Entities by eBay, Inc. (Polito, John) (Filed on 4/8/2011) (Entered: 04/08/2011) |
| 04/13/2011 | <u>47</u> | MOTION for Leave to File <i>FIRST AMENDED COMPLAINT</i> filed by Melissa J Earll. Motion Hearing set for 7/22/2011 09:00 AM in Courtroom 3, 5th Floor, San |

| | | |
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| | | Jose before Hon. Jeremy Fogel. (Attachments: # <u>1</u> Affidavit Ex. A – Declaration in Support, # <u>2</u> Exhibit Ex. B – First Amended Complaint, # <u>3</u> Proposed Order Ex. C – [Proposed] Order)(Aschenbrener, Michael) (Filed on 4/13/2011) (Entered: 04/13/2011) |
| 04/22/2011 | <u>48</u> | ADR Certification (ADR L.R. 3–5 b) of discussion of ADR options (Polito, John) (Filed on 4/22/2011) (Entered: 04/22/2011) |
| 04/22/2011 | <u>49</u> | STIPULATION and Proposed Order selecting Private ADR by Melissa J Earll, eBay, Inc. <i>re mediation that occurred prior to transfer (Dkt. 18)</i> (Polito, John) (Filed on 4/22/2011) (Entered: 04/22/2011) |
| 04/22/2011 | <u>50</u> | CLERKS NOTICE The Motion Hearing set for 5/13/2011 is VACATED. The Case Management Conference set for 5/13/2011 is CONTINUED to 7/22/2011 at 9:00 AM in Courtroom 3, 5th Floor, San Jose. (jflc2, COURT STAFF) (Filed on 4/22/2011) (Entered: 04/22/2011) |
| 07/01/2011 | <u>51</u> | RESPONSE (re <u>47</u> MOTION for Leave to File <i>FIRST AMENDED COMPLAINT</i>) <i>Opposition to Plaintiff's Motion for Leave to File First Amended Complaint</i> filed by eBay, Inc.. (Attachments: # <u>1</u> Proposed Order)(Polito, John) (Filed on 7/1/2011) (Entered: 07/01/2011) |
| 07/01/2011 | <u>52</u> | Declaration of John A. Polito in Support of <u>51</u> Opposition/Response to Motion, filed by eBay, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Related document(s) <u>51</u>) (Polito, John) (Filed on 7/1/2011) (Entered: 07/01/2011) |
| 07/01/2011 | <u>53</u> | Request for Judicial Notice re <u>52</u> Declaration in Support <i>Request for Judicial Notice of Ex. B to Polito Decl.</i> filed by eBay, Inc.. (Related document(s) <u>52</u>) (Polito, John) (Filed on 7/1/2011) (Entered: 07/01/2011) |
| 07/08/2011 | <u>54</u> | REPLY (re <u>47</u> MOTION for Leave to File <i>FIRST AMENDED COMPLAINT</i>) , <i>in support of</i> filed by Melissa J Earll. (Aschenbrener, Michael) (Filed on 7/8/2011) (Entered: 07/08/2011) |
| 07/13/2011 | <u>55</u> | CLERKS NOTICE The Motion Hearing and Case Management Conference set for 7/22/2011 are RESET for 8/5/2011 at 9:00 AM in Courtroom 3, 5th Floor, San Jose before Hon. Jeremy Fogel. (jflc2, COURT STAFF) (Filed on 7/13/2011) (Entered: 07/13/2011) |
| 07/29/2011 | <u>56</u> | CASE MANAGEMENT STATEMENT filed by Melissa J Earll, eBay, Inc.. (Polito, John) (Filed on 7/29/2011) (Entered: 07/29/2011) |
| 07/29/2011 | <u>57</u> | ADR Certification (ADR L.R. 3–5 b) of discussion of ADR options – – <i>PLAINTIFF</i> (Aschenbrener, Michael) (Filed on 7/29/2011) (Entered: 07/29/2011) |
| 07/29/2011 | <u>58</u> | NOTICE of Change of Address by Michael James Aschenbrener – – <i>Plaintiff's Counsel</i> (Aschenbrener, Michael) (Filed on 7/29/2011) (Entered: 07/29/2011) |
| 07/29/2011 | <u>59</u> | Certificate of Interested Entities by Melissa J Earll (Aschenbrener, Michael) (Filed on 7/29/2011) (Entered: 07/29/2011) |
| 08/05/2011 | <u>60</u> | Minute Entry: Motion Hearing held on 8/5/2011 before Judge Jeremy Fogel (Date Filed: 8/5/2011) re <u>47</u> MOTION for Leave to File <i>FIRST AMENDED COMPLAINT</i> . The motion is taken under submission. (Court Reporter Lee–Anne Shortridge.) (dlm, COURT STAFF) (Date Filed: 8/5/2011) (Entered: 08/17/2011) |
| 09/07/2011 | <u>61</u> | ORDER DENYING WITHOUT PREJUDICE <u>47</u> MOTION FOR LEAVE TO FILE AMENDED COMPLAINT. Earll shall file an amended complaint consistent with this order not later than thirty (30) days from the date of this order. The pending motion to dismiss is hereby terminated as moot. (and terminating as moot <u>45</u> Motion to Dismiss). Signed by Judge Jeremy Fogel on 9/6/2011. (jflc2, COURT STAFF) (Filed on 9/7/2011) Modified on 9/29/2011 (cv, COURT STAFF). (Entered: 09/07/2011) |
| 09/27/2011 | <u>62</u> | ORDER REASSIGNING CASE. Case reassigned to Judge Edward J. Davila for all further proceedings. Judge Jeremy Fogel no longer assigned to the case. Signed by The Executive Committee on 09/27/2011. (tsh, COURT STAFF) (Filed on 9/27/2011) (Entered: 09/27/2011) |

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| 10/05/2011 | <u>63</u> | FIRST AMENDED COMPLAINT against eBay, Inc.. Filed by Melissa J Earll. (Aschenbrener, Michael) (Filed on 10/5/2011) Modified on 10/5/2011 (cv, COURT STAFF). (Entered: 10/05/2011) |
| 10/06/2011 | <u>64</u> | NOTICE of Change of Address by John Anthony Polito <i>NOTICE OF CHANGE OF FIRM ADDRESS (Bingham McCutchen)</i> (Polito, John) (Filed on 10/6/2011) (Entered: 10/06/2011) |
| 10/07/2011 | <u>65</u> | CLERKS NOTICE SETTING CASE MANAGEMENT CONFERENCE. Joint Case Management Statement due by 3/2/2012. Case Management Conference set for 3/9/2012 10:00 AM in Courtroom 1, 5th Floor, San Jose. (ecg, COURT STAFF) (Filed on 10/7/2011) (Entered: 10/07/2011) |
| 10/19/2011 | <u>66</u> | MOTION to Dismiss <i>First Amended Complaint</i> filed by eBay, Inc.. Motion Hearing set for 2/10/2012 09:00 AM in Courtroom 1, 5th Floor, San Jose before Hon. Edward J. Davila. Responses due by 11/2/2011. Replies due by 11/9/2011. (Attachments: # <u>1</u> Proposed Order)(Huser, Mary) (Filed on 10/19/2011) (Entered: 10/19/2011) |
| 10/19/2011 | <u>67</u> | Declaration of John A. Polito in Support of <u>66</u> MOTION to Dismiss <i>First Amended Complaint</i> filed by eBay, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(Related document(s) <u>66</u>) (Polito, John) (Filed on 10/19/2011) (Entered: 10/19/2011) |
| 11/02/2011 | <u>68</u> | OPPOSITION (re <u>66</u> MOTION to Dismiss <i>First Amended Complaint</i>) filed by Melissa J Earll. (Aschenbrener, Michael) (Filed on 11/2/2011) Modified on 2/27/2012 (cv, COURT STAFF). (Entered: 11/02/2011) |
| 11/09/2011 | <u>69</u> | REPLY (re <u>66</u> MOTION to Dismiss <i>First Amended Complaint</i>) filed by eBay, Inc.. (Huser, Mary) (Filed on 11/9/2011) (Entered: 11/09/2011) |
| 02/07/2012 | <u>70</u> | CLERKS NOTICE TAKING MOTION UNDER SUBMISSION WITHOUT ORAL ARGUMENT. The Motion to Dismiss (Docket Item No. <u>66</u>) before Judge Edward J. Davila previously noticed for 2/10/2012 at 9:00 AM has been taken under submission without oral argument pursuant to Civ. L.R. 7-1(b). The 2/10/2012 hearing is VACATED. The Court to issue further Order on the submitted motion(s). This is a text only docket entry, there is no document associated with this notice. (ecg, COURT STAFF) (Filed on 2/7/2012) (Entered: 02/07/2012) |
| 02/27/2012 | <u>71</u> | STIPULATION WITH PROPOSED ORDER to <i>Reschedule CMC</i> filed by Melissa J Earll, eBay, Inc.. (Polito, John) (Filed on 2/27/2012) (Entered: 02/27/2012) |
| 02/29/2012 | <u>72</u> | ORDER VACATING CASE MANAGEMENT CONFERENCE re <u>71</u> STIPULATION. The 3/9/2012 Case Management Conference and associated deadlines are VACATED. The court will address scheduling issues further in the order on Defendant's Motion to Dismiss. Signed by Judge Edward J. Davila on 2/29/2012. (ecg, COURT STAFF) (Filed on 2/29/2012) (Entered: 02/29/2012) |
| 07/02/2012 | <u>73</u> | MOTION for Leave to File <i>Statement of Recent Decision</i> filed by Melissa J Earll. (Attachments: # <u>1</u> Declaration, # <u>2</u> Exhibit Statement of Recent Decision, # <u>3</u> Exhibit Recent Decision, # <u>4</u> Proposed Order)(Aschenbrener, Michael) (Filed on 7/2/2012) (Entered: 07/02/2012) |
| 07/03/2012 | <u>74</u> | Statement of Non-Opposition re <u>73</u> MOTION for Leave to File <i>Statement of Recent Decision</i> filed by eBay, Inc.. (Related document(s) <u>73</u>) (Huser, Mary) (Filed on 7/3/2012) (Entered: 07/03/2012) |
| 07/27/2012 | <u>75</u> | ORDER granting <u>73</u> Motion for Leave to File Statement of Recent Decision. Signed by Judge Edward J. Davila on 7/27/2012. (ejdlc1, COURT STAFF) (Filed on 7/27/2012) (Entered: 07/27/2012) |
| 08/08/2012 | <u>76</u> | Order Granting <u>66</u> Motion to Dismiss. Based on the foregoing, eBay's Motion to Dismiss the FAC is GRANTED WITHOUT LEAVE TO AMEND as to Earll's ADA and DPA claims. eBay's Motion to Dismiss is GRANTED WITH LEAVE TO AMEND as to Earll's Unruh Act claim. Any amended complaint must be filed no later than 30 days from the filing of this order. Signed by Hon. Edward J. Davila on 8/8/2012 (ejdlc2, COURT STAFF) (Filed on 8/8/2012) Modified text on |

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| 01/18/2013 | <u>90</u> | USCA Case Number 13–15134 Ninth Circuit Court Appeals The schedule is set as follows: Mediation Questionnaire due on 01/25/2013. Transcript ordered by 01/22/2013. Transcript due 02/19/2013. Appellant Melissa J. Earll opening brief due 04/01/2013. Appellee Ebay, Inc. answering brief due 04/29/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. for <u>88</u> Notice of Appeal, filed by Melissa J Earll. (cv, COURT STAFF) (Filed on 1/18/2013) (Entered: 01/18/2013) |
| 02/13/2013 | <u>91</u> | Transcript of Proceedings held on 8–5–11, before Judge Jeremy Fogel. Court Reporter/Transcriber Lee–Anne Shortridge, Telephone number 408–287–4580. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 5/14/2013. (las,) (Filed on 2/13/2013) (Entered: 02/13/2013) |
| 02/13/2013 | <u>92</u> | Certificate of Record forwarded to USCA re appeal <u>88</u> Notice of Appeal, : (cv, COURT STAFF) (Filed on 2/13/2013) (Additional attachment(s) added on 2/14/2013: # <u>1</u> certificate of record) (cv, COURT STAFF). (Entered: 02/13/2013) |

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 26, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 26, 2013

ASCHENBRENER LAW, P.C.

By: s/ Michael Aschenbrener
Michael Aschenbrener
Attorneys for Plaintiff-Appellant